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Supreme Court, U.S.
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No. 101218

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In the

Supreme Court of the United States

VANESSA SIMMONDS,

Petitioner,

v.

CREDIT SUISSE SECURITIES (USA) LLC, ET AL.,

Respondents.

IN RE SECTION 16(b) LITIGATION

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), is the only statute enacted by Congress that directly targets insider trading. Congress designed Section 16(b) to promote the public's interest in preserving the integrity of United States financial markets. Section 16(b) is a strict liability scheme. It requires statutory insiders to disgorge profits from short-swing transactions in publicly-traded issuer securities. Congress gave exclusive enforcement authority of Section 16(b) to issuers and their shareholders. Section 16(b) requires a shareholder to make a 60-day demand on the issuer. The statute authorizes the shareholder to bring suit against the insider if the issuer does not do so within the 60-day period.

Section 16(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(a), requires statutory insiders to disclose short-swing trading activity in reports filed with the United States Securities and Exchange Commission. These reporting obligations are an integral part of Section 16 enforcement. The information insiders are required to disclose constitutes the main source—typically the only source—of information for the suits Congress authorized shareholders to bring under Section 16(b).

The questions presented are:

1. What is required of an outside shareholder's Section 16(b) demand when the targeted insider has failed to comply with its Section 16(a) reporting obligations?

2. Where an insider has failed to file a Section 16(a) report and the district court nevertheless deems the shareholder's pre-suit demand factually insufficient, may the shareholder argue demand futility when the issuer has been served with a viable complaint yet continues to manifest its intent not to pursue the Section 16(b) claim?

3. Does a Section 16(b) insider who has failed to file a Section 16(a) report have standing to challenge the sufficiency of the shareholder's pre-suit demand?

4. Should a dismissal for sending a Section 16(b) pre-suit demand deemed factually insufficient be with or without prejudice where the targeted insider has failed to file a Section 16(a) report?

LIST OF PARTIES

Pursuant to Rule 14.1(b), below is a list of all parties in the court whose judgment is the subject of this petition:

Plaintiff/Petitioner

1. Vanessa Simmonds

Defendants/Respondents ["Underwriters"]

1. Credit Suisse Securities (USA) LLC
2. Goldman Sachs & Co.
3. J.P. Morgan Securities Inc.
4. Merrill Lynch, Pierce, Fenner & Smith Inc.
5. Bank of America Corporation
6. Robertson Stephens, Inc.
7. Deutsche Bank Securities Inc.
8. Morgan Stanley & Co. Inc.
9. Citigroup Global Markets, Inc.
10. Bear, Stearns & Co., Inc.
11. Lehman Brothers Inc.

Nominal Parties/Respondents ["Moving Issuers"]

1. Onvia, Inc.
2. Finisar Corporation
3. Ariba, Inc.
4. Akamai Technologies, Inc.
5. Intersil Corporation
6. Avici Systems, Inc.
7. Tivo, Inc.
8. Selectica, Inc.
9. Red Hat, Inc.
10. Vignette Corporation
11. Sycamore Networks, Inc.
12. Silicon Laboratories Inc.

13. Maxygen, Inc.
14. The Street.com, Inc.
15. Sonus Networks, Inc.
16. Priceline.com Inc.
17. Martha Stewart Living Omnimedia, Inc.
18. Audible, Inc.
19. Capstone Turbine Corporation
20. CoSine Communications, Inc.
21. Perot Systems Corporation
22. AsiaInfo Holdings, Inc.
23. Saba Software, Inc.
24. Digimarc Corporation
25. InterNAP Network Services Corporation
26. Packeteer Inc.
27. Aspect Medical Systems, Inc.
28. NaviSite, Inc.
29. Oplink Communications, Inc.
30. Occam Networks, Inc.

Nominal Parties ["Non-Moving Issuers"]

1. Foundry Networks, Inc.
2. Avanex Corporation
3. Turnstone Systems, Inc.
4. Silicon Image, Inc.
5. Juniper Networks
6. Kana Software, Inc.
7. Interwoven, Inc.
8. Openwave Systems, Inc.
9. Informatica Corporation
10. Critical Path, Inc.
11. SourceForge, Inc.
12. Concur Technologies, Inc.
13. Palm, Inc.
14. Brocade Communications Systems, Inc.
15. Microtune, Inc.
16. Extreme Networks, Inc.

17. InsWeb Corporation
18. Marvell Technology Group Ltd.
19. Keynote Systems, Inc.
20. Tibco Software Inc.
21. Transmeta Corporation
22. Airspan Networks, Inc.
23. OmniVision Technologies, Inc.
24. Immersion Corporation

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OPINIONS BELOW

The order and second amended published opinion of the United States Court of Appeals for the Ninth Circuit, dated January 25, 2011, are reproduced at Appendix A. The decision is reported at *In re Section 16(b) Litigation*, --- F.3d ---, 2011 WL 135693 (9th Cir. 2011).

The Order Dismissing Cases of the United States District Court for the Western District of Washington (Seattle), dated March 12, 2009, is reproduced at Appendix B. The order also is reported at *In re Section 16(b) Litigation*, 602 F. Supp. 2d 1202 (W.D. Wash. 2009).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The decision of the Ninth Circuit sought to be reviewed was entered on January 25, 2011. The Ninth Circuit first published its decision on December 2, 2010. It amended this decision on January 18, 2011, and again on January 25, 2011. The January 25, 2011, second amended opinion also contains the Ninth Circuit's order denying Petitioner's and Respondents' respective timely petitions for rehearing *en banc*. *See* Appendix A at 42a. The Ninth Circuit granted Petitioner's and Respondents' requests to stay issuance of the mandate on January 25, 2011, and January 26, 2011, respectively, pending the filing of the parties' petitions for writs of certiorari in this Court.

STATUTORY PROVISION INVOLVED

15 U.S.C § 78p(b)
[Section 16(b) of the Securities
Exchange Act of 1934]

For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer ... within any period of less than six months ... shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction .... ***Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter***; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security ... involved, or any transaction or transactions which the Commission by rules and regulations may

> exempt as not comprehended within the purpose of this subsection.

(Emphasis added).

STATEMENT OF THE CASE

I. BACKGROUND ON SECTION 16(b)

Section 16(b) is the only federal statute enacted by Congress "to curb the evils of insider trading." *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 422 (1972). The statute "imposes a strict prophylactic rule with respect to [statutory] insider, short-swing trading." *Foremost-McKesson, Inc. v. Provident Sec. Co.*, 423 U.S. 232, 251 (1976). Statutory insiders include officers, directors, and shareholders with more than a 10 percent interest in the issuing company. 15 U.S.C. § 78p(b). The latter may be formed by a "group" that collectively owns more than 10 percent of an issuer's securities. *Roth v. Jennings*, 489 F.3d 499, 510-16 (2d Cir. 2007).

Statutory insiders are "presumed to have access to inside information." *Foremost-McKesson*, 423 U.S. at 243. When they profit from trades in publicly-traded issuer stock within any six month period ("short-swing trading"), the insiders must disgorge their profit to the issuer. 15 U.S.C. § 78p(b); *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 595 (1973).

The United States Securities and Exchange Commission ("SEC") was given no role in enforcing Section 16(b). *Gollust v. Mendell*, 501 U.S. 115, 122 (1991). Congress permitted only private enforcement

and relies on private attorneys to spearhead that effort:

> Congress left enforcement of section 16(b) cases to shareholders and consequently to the attorneys who find such cases and represent the shareholders who consent to be plaintiffs. The SEC was given no role in enforcing section 16(b). Thus, section 16(b) can be enforced and the market's integrity can be protected, only if attorneys are willing to invest the time and energy, and assume the risk, that is involved in investigating numerous SEC filings in the search to uncover insiders who make improper short swing profits, and filing lawsuits against those unwilling to return such profits.

Klein v. Salvi, No. 02 Civ. 1862 (AKH), 2004 WL 596109, at *10 (S.D.N.Y. Mar. 30, 2004), *aff'd*, 2004 WL 2931121 (2d Cir. 2004).

The shareholder, not the issuer, retains "the ultimate authority" to sue for Section 16(b) enforcement. *Gollust*, 501 U.S. at 122. Section 16(b) requires that the shareholder send a demand to the issuer before bringing suit against the insider. If the issuer declines to bring a Section 16(b) action within 60 days of a demand by a security holder, or fails to prosecute the action "diligently," then the security holder may "institute" an action to recover insider short-swing profits. 15 U.S.C. § 78p(b); *see also Gollust*, 501 U.S. at 122. Section 16(b) does not set out any requirements for the demand itself.

Section 16(a) requires insiders to publicly disclose their short-swing securities transactions in order to

combat the practices Congress enacted Section 16(b) to prevent. 15 U.S.C. § 78p(a). As described by the SEC:

> Section 16 ... was designed to provide the public with information on insider securities transactions and holdings and to deter insiders from profiting on short term trading transactions in the securities of their corporations on the basis of undisclosed information. The section was enacted primarily in response to abuses, described in detail in the legislative history of the Exchange Act, where insiders with advance knowledge of facts which would produce a rise or fall in the market value of securities of their companies bought and sold such securities as the circumstances warranted to their personal advantage. On occasion, insiders actually manipulated the market price of their stock by causing a corporation to follow financial policies calculated to produce sudden changes in market prices in order to obtain short swing profits. To combat these practices, Congress enacted Section 16 to require reports of securities transactions by insiders and to provide for the recovery of any short swing profits.

Securities and Exchange Commission, *Interpretive Release on Rules Applicable to Insider Reporting and Trading*, 46 FR 48147 (1981) (footnotes omitted); *see also Gollust*, 501 U.S. at 121 (describing purpose of Section 16(b) as ensuring "maintenance of fair and honest markets" through elimination of profits from insider, short-swing trading); *Foremost-McKesson*, 423 U.S. at 243-44 (same); *Kern County Land*, 411 U.S. at 592 (same; setting out legislative history).

The "repcrts" to which the SEC refers are commonly known as "Section 16(a) reports." "The disclosures and reports of § 16(a) are an integral part of the context of § 16 within which § 16(b) must be read." *Whittaker v. Whittaker Corp.*, 639 F.2d 516, 528 (9th Cir. 1981). Information in Section 16(a) reports is the "main source of information for suits Congress has empowered [shareholders] to bring" under Section 16(b). *Id.* The drafters of Section 16(b) "clearly thought" that the Section 16(a) disclosure requirements also "would afford indirect protection against some potential misuses of insider information." *Foremost-McKesson*, 423 U.S. at 255-56, 257 n.31 (citing legislative history).

Section 16(a) reports contain, *inter alia*, short-swing trading and group membership details. The reports require disclosure of:

- The identity of the reporting person.
- Whether the reporting person is an officer, director, or 10 percent shareholder.
- Whether the reporting person is filing individually or as part of a "group."
- The dates of the reported short-swing trades.
- The amounts, prices, and nature of the securities acquired, disposed of, or beneficially owned.

See Appendix D [blank Section 16(a) report]; 15 U.S.C. § 78p(a). Section 16(a) reports allow the examining shareholder to isolate the dates of the trades at issue,

mathematically compute the short-swing profits to be disgorged, identify the statutory insiders as individuals or groups, and pinpoint the shares in which the insiders have or share "a direct or indirect pecuniary interest." 17 C.F.R. § 240.16a-1(a)(2). Without Section 16(a) reports, outsiders, like Petitioner, have no access to this and other claim-related information.

None of the targeted insiders in these cases filed Section 16(a) reports.

II. STATEMENT OF FACTS

A. Petitioner's Claim

The investment bank Respondents ("Underwriters"), which served as lead underwriters of initial public offerings ("IPOs") of nominal party issuers ("Issuers"), reaped extraordinary profits through short-swing, insider trading of Issuer IPO stock. From 1998 through 2000, the stock market experienced a surge of so-called "hot" IPOs. In these IPOs, demand for stock far exceeded the supply offered through the IPOs, resulting in significantly higher aftermarket prices. The SEC and other governing body rules require underwriters to make complete distributions of IPO shares at the IPO price. Underwriters are prohibited from deriving financial gain from increases in aftermarket prices of hot IPO stocks. Underwriters cannot allocate shares to themselves, and even shares allocated after trading commences in the aftermarket at a higher price must be distributed at the IPO price.

Underwriters distributed IPO shares to the market and controlled who received hot IPO allocations. In doing so, they distributed what were essentially instant, risk-free profits. For example, an investor receiving an allocation of Issuer Source Forge, Inc. (formerly VA Linux) stock at its IPO price of $30 per share on the morning of December 9, 1999, realized a ten-fold profit when VA Linux shares opened for public trading later that morning at $299 per share.

Underwriters, together with Issuer insiders, shared in these profits. Underwriters demanded kickbacks of profits from customers who received allocations of hot IPOs and "flipped" (immediately sold) the shares at significantly higher aftermarket prices. Underwriters disguised their profit-sharing arrangements because they are illegal. For example, in a complaint filed against Underwriter Credit Suisse First Boston ("CSFB"), the SEC explained:

> In exchange for shares in "hot" IPOs, CSFB wrongfully extracted from certain customers a large portion of the profits those customers made by flipping their IPO stock. From at least April 1999 through June 2000, CSFB employees allocated shares of IPOs to over 100 customers who were willing to funnel between 33 and 65 percent of their profits to CSFB. The profits were channeled to CSFB in the form of excess brokerage commissions generated by the customers in unrelated securities trades that the customers generally affected solely to satisfy CSFB's demands for a share of the IPO profits.

To increase the profit potential of hot IPOs, Underwriters and Issuer insiders engaged in what the

SEC refers to as "laddering." They agreed to underprice hot IPO shares and required recipients of IPO allocations to "ratchet up" the stock price in the aftermarket by buying additional shares at progressively higher prices.[1] This conduct is prohibited.

Issuer insiders also personally benefited from underpricing and laddering schemes. Like Underwriters, Issuer insiders allocated underpriced IPO shares—but without restrictions on allocating shares to themselves, friends, and family members.

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[1] Academics refer to underpricing as "money left on the table"—money issuers could have raised in an IPO. Tim Loughran & Jay Ritter, *Why Has IPO Underpricing Changed Over Time?*, 33 FIN. MGMT. 5, 6 (Autumn 2004). The targeted insiders in this appeal profited substantially from the conduct alleged. The 54 IPOs at issue in this appeal generated over $7 billion in proceeds for Issuers, but left over $15 billion "on the table." This makes them among the most egregious examples of IPO underpricing. *See generally* Jay Ritter, *Money Left on the Table in IPOs by Firm* (Mar. 19, 2008), *available at* http://bear.warrington.ufl.edu/ritter/moneyonthetablebyfirm.pdf. The phenomenon of intentionally underpricing IPOs has generated a tremendous amount of recent scholarship, essentially all of which supports the thesis underlying Petitioner's Section 16(b) claim. *See generally* Xiaoding Lui & Jay R. Ritter, *Corporate Executive Bribery: An Empirical Analysis* (Dec. 4, 2007), *available at* http://bear.warrington.ufl.edu/ritter/work_papers/BriberyDec42007.pdf; Stephen J. Choi & A.C. Pritchard, *Should Issuers Be on the Hook for Laddering? An Empirical Analysis of the IPO Market Manipulation Litigation*, 73 U. CIN. LAW REV. 179 (2004); J. Griffin, et al., *Why Are IPO Investors Net Buyers Through Lead Underwriters?*, 85 J. FIN. ECON. 518 (2007); Tim Loughran & Jay Ritter, *Why Don't Issuers Get Upset About Leaving Money on the Table in IPOs?*, 15 REV. FIN. STUD. 413 (2002). These articles cite, and are cited by, many others supporting the same or related propositions.

Like Underwriters, laddering allowed insiders to profit from sales at inflated prices.

Underwriters and Issuer insiders worked together to underprice IPOs and drive up aftermarket stock prices as part of a common objective that involved acquiring, holding, and disposing of Issuer shares. They thereby formed groups that collectively owned more than 10 percent of an issuer's stock, establishing Underwriters' status as statutory insiders under Section 16(b). As statutory insiders, Underwriters profited from short-swing transactions in Issuer shares. Pursuant to Section 16(b), these insiders therefore must disgorge the profits generated from the short-swing purchases and sales of Issuer shares in which they had a pecuniary interest.

B. Petitioner's Pre-Suit Demand Correspondence

Petitioner issued demands to each Issuer as required by Section 16(b). None of the statutory insiders, however, had filed a Section 16(a) report—the "main source of information for suits Congress has empowered [shareholders] to bring" under Section 16(b). *Whittaker*, 639 F.2d at 528. Petitioner, therefore, had no access to short-swing trading and group membership details. In her initial demand letter, Petitioner nonetheless:

- identified herself as an Issuer shareholder;
- identified the IPO Underwriters and others as insiders;

- described how they formed a Section 16(b) "group" with a more-than-10 percent shareholder status—by coordinating their efforts for the purpose of acquiring, holding, and/or disposing of Issuer securities within periods of less than six months over a specified period of approximately one year post-IPO;

- explained that the insiders failed to file Section 16(a) reports with the SEC;

- demanded that the Issuer bring Section 16(b) claims against the statutory insiders; and

- advised the Issuer of Petitioner's right to institute her own action if the Issuer did not initiate an action against the insiders.

Appendix E [representative copy].

Petitioner did not describe harm to the issuer. Unlike a derivative case under Federal Rule of Civil Procedure 23.1, harm to the issuer is not an element of a Section 16(b) cause of action. The issuer "has not suffered any damages and ... is not being reimbursed for any loss." *Coran v. Snap-On Tools Corp.*, 408 F. Supp. 1060, 1063 (E.D. Wis. 1976). Profit disgorgement—the sole remedy under Section 16(b)—goes to issuers, not shareholder-plaintiffs. *Id.* It "is purely 'windfall' in nature." *Id.*

Through virtually identical responses, some from law firms that had represented the targeted Underwriters in the IPOs at issue, 25 Issuers requested and received additional information

regarding Petitioner's Section 16(b) claims. In her second letter, Petitioner:

- referred to "the lead underwriters, officers, directors and principal shareholders identified in the Company's IPO prospectus" as group members who "coordinated their efforts for the purposes of acquiring, holding and/or disposing of" issuer stock;

- reiterated targeted short-swing trades occurred "within periods of less than six months" over a specified period of approximately one year post-IPO;

- advised that the conduct involved "laddering" and "spinning," and referred inquiring attorneys to "court, law firm and SEC websites;" and

- advised she expected "only the lead underwriters to be named as defendants," but reserved the right to name other, later-identified group members.

Appendix F [representative copy]. Even without Section 16(a) reports, Petitioner provided all of the information requested except her counsel's "internal legal analysis" of various aspects of Section 16(b) law. *Id.*

C. Petitioner's Complaint and District Court Consolidation

Petitioner commenced litigation when no Issuer filed suit within 60 days of her demand. She filed 55 lawsuits in the United States District Court for the

Western District of Washington (Seattle) in October 2007. All 55 suits alleged Section 16(b) violations stemming from the same business practices adopted and repeatedly employed by the 11 Underwriter defendants as described above. The district court's subject matter jurisdiction was based on Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa. A representative complaint is attached as Appendix G. The district court reassigned all the actions to a single judge and coordinated the cases for pretrial purposes. *See also* Appendix C (listing of all *In re Section 16(b) Litigation* proceedings).

III. DECISION OF THE DISTRICT COURT

Underwriters filed an omnibus Federal Rule of Civil Procedure 12 motion to dismiss. They asserted that Petitioner's claims were time barred by operation of Section 16(b)'s two-year statute of limitations. Although the beneficiaries of any recovery, 30 of the then 54 Issuers ("Moving Issuers")[2] also filed a joint Rule 12 motion to dismiss. Like Underwriters, Moving Issuers asserted that Petitioner's claims were time barred. They also asserted, however, that Petitioner served factually inadequate pre-suit demands.

On March 12, 2009, the district court granted the motions on both statute of limitations and pre-suit demand grounds, and entered judgment against Petitioner. Appendix B. The district court ruled that

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[2] Petitioner voluntarily dismissed one of the 55 cases after the issuer involved was taken private and, as a result, Petitioner lost standing to maintain the Section 16(b) action. *See Gollust*, 501 U.S. at 125-26 (explaining Section 16(b) standing requirements).

Petitioner lacked standing in the 30 cases in which Moving Issuers argued her pre-suit demands were insufficient. *Id.* at 92a-102a. It also rejected Petitioner's demand futility arguments. *Id.* at 102a-103a. The district court dismissed those 30 cases "without prejudice." *Id.* at 103a, 111a, 112a. In the remaining 24 cases, the district court reached Underwriters' motion to dismiss, granted it on statute of limitations grounds, and dismissed those 24 cases "with prejudice." *Id.* at 103a-113a.

IV. DECISION OF THE NINTH CIRCUIT

Petitioner appealed the district court's decision to the Ninth Circuit Court of Appeals, invoking the court's appellate jurisdiction under 28 U.S.C. § 1291. *See* Appendix C (listing of *In re Section 16(b) Litigation* proceedings, including appeal and cross-appeal numbers).[3] The Ninth Circuit reversed the statute of limitations dismissal. It held that the two-year statute of limitations in Section 16(b) does not begin to run until the insider discloses its transactions in a Section 16(a) report. Appendix A at 64a-69a.

Tolling the two-year statute of limitations in Section 16(b) for noncompliance with Section 16(a) reporting exemplifies the interdependence between Sections 16(a) and 16(b). *See Whittaker*, 639 F.2d at 528 ("The short [two-year] limitations period [in Section 16(b)] is understandable only in the context of the insider's duty to make prompt disclosure [pursuant

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[3] As in the district court, the consolidated litigation proceeded under the master/lead case involving issuer Onvia, Inc. (Ninth Circuit Appeal No. 09-35262, Cross-Appeal No. 09-35363).

to Section 16(a)]."). The same should be said of the Section 16(b) demand requirement. Despite the insiders' noncompliance with Section 16(a)'s reporting obligations, the Ninth Circuit affirmed the district court's ruling that Petitioner's demand was insufficient and that Petitioner could not argue demand futility. Appendix A at 50a-64a. The Ninth Circuit also, *sua sponte*, "converted" those dismissals "without prejudice" to dismissals "with prejudice"—and did not permit leave to amend on remand. *Id.* at 69a-71a.

REASONS FOR GRANTING THE PETITION

Congress enacted Section 16(b) for a single purpose: to protect the integrity of the United States financial markets by combating "the evils of insider trading." *Reliance Elec.*, 404 U.S. at 422. There arguably has never been a time in American history when striving to achieve this critically important national goal was more important than it is now. United States Attorney for the Southern District of New York, Preet Bharara, whose jurisdiction covers our nation's financial epicenter, recently warned:

> [I]llegal insider trading is rampant and may even be on the rise.... Disturbingly, many of the people who are going to such lengths to obtain inside information for a trading advantage are already among the most advantaged, privileged, and wealthy insiders in modern finance.[4]

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[4] *See* Prepared Remarks of U.S. Attorney P. Bharara, *The Future of White Collar Enforcement: A Prosecutor's View*, New York City Bar Ass'n (Oct. 20, 2010), *available at* http://www.nycbar.org/

This Court has reviewed only five Section 16(b) cases in the 77-year history of the statute.[5] Only one (in 1991) was decided within the last 35 years. None has addressed the questions presented for review here. These questions are fundamental to the Section 16(b) enforcement scheme that Congress envisioned when it enacted the Securities Exchange Act of 1934.

The questions presented raise a basic issue: whether Rule 23.1—a separate body of law developed for state derivative cases—should be imported to apply to Section 16(b) demands. The Ninth Circuit decision subjects Section 16(b) claims to the procedural dictates of Rule 23.1. The decision eviscerates safeguards Congress built into Section 16(b) to prevent the very class of people at whom Section 16(b) is directed—company insiders—from being the gatekeepers of Section 16(b) claims. The Ninth Circuit decision conflicts with other circuit court decisions, Delaware law, and the congressional intent behind the insider trading enforcement scheme under Section 16. It also misapplies this Court's opinion in *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90 (1991). Finally, the Ninth Circuit's *sua sponte* conversion of dismissal without prejudice to dismissal with prejudice—on the non-merits, pre-suit demand

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pdf/The%20Future%20of%20White%20Collar%20Enforcement-Prepared%20Remarks.pdf.

[5] *Gollust v. Mendell*, 501 U.S. 115 (1991); *Foremost-McKesson, Inc. v. Provident Sec. Co.*, 423 U.S. 232 (1976); *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582 (1973); *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 422 (1972); *Blau v. Lehman*, 368 U.S. 403 (1962).

issue—conflicts with Federal Rule of Civil Procedure 15 and First Circuit precedent.

I. THE NINTH CIRCUIT'S INCORPORATION OF RULE 23.1 DERIVATIVE LAW TO GOVERN SECTION 16(b) DEMAND SUFFICIENCY CONFLICTS WITH OTHER CIRCUITS AND DELAWARE LAW, AND UNDERMINES THE SECTION 16 ENFORCEMENT SCHEME.

No decision from this Court, or any circuit court before the Ninth Circuit decision, has ever addressed the requirements of a Section 16(b) pre-suit demand when the insiders have failed to comply with Section 16(a). Section 16(b) explicitly requires that a demand be sent but does not state requirements for the demand. Leading Section 16 commentators maintain that a Section 16(b) demand does not have stringent requirements. It is a letter "typically ... one page in length," "often [sent] by fax or e-mail." Peter Romeo & Alan Dye, SECTION 16 § 9.02[4] (2008). It "usually will":

> (i) identify the security holder ..., (ii) demand recovery of short-swing profits allegedly realized by a named insider, (iii) describe in generic terms the transactions giving rise to the claim, and (iv) threaten suit unless the issuer within 60 days either recovers the alleged profits or files a suit for that purpose.

Id.[6] Petitioner's demand satisfied each of these elements subject to the constraints imposed on her by the insiders' failure to file Section 16(a) reports. Without Section 16(a) reports, outsiders have no way to ascertain the accounting specifics of the short-swing transactions and the names of all group members. No additional investigation could reveal this information to any non-insider shareholder like Petitioner.

A. The Ninth Circuit Misapplied *Kamen* and Is the Only Circuit to Apply Rule 23.1 to Assess a Section 16(b) Demand.

The Ninth Circuit decision, for the first time, sets out requirements for a Section 16(b) demand where Section 16(a) reports have not been filed. However, in doing so, the court did not consider the purposes of Section 16(b), the legislative scheme Congress enacted with Section 16, or the significant disadvantage an outside shareholder has when the targeted insiders fail to comply with their Section 16(a) reporting obligations. *Compare Reliance Elec.*, 404 U.S. at 424 (Section 16(b) terms must be construed to "best serve[] the congressional purpose of curbing short-swing speculation by corporate insiders").

Instead, the Ninth Circuit borrowed and adopted the higher level of specificity required of demands under Rule 23.1. This is a new standard for Section 16(b) litigation. It transforms insiders' Section 16(a)

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[6] "A copy of the complaint need not be appended. Indeed, the security holder would probably not have prepared the complaint by that time." Arnold S. Jacobs, *An Analysis of Section 16 of the Securities Exchange Act of 1934*, 32 N.Y.L. SCH. L. REV. 209, 583 (1987).

disclosure obligations into an impossible burden of investigation on Section 16(b) plaintiffs. Imposing heightened procedural rules—especially where the insiders have failed to comply with Section 16(a)—conflicts with the Section 16 enforcement regime and the rationale expressed in decisions from this Court and other circuit courts. Under the Ninth Circuit approach, insiders can shield themselves from Section 16(b) liability by avoiding their obligation to file Section 16(a) reports. Without the information contained in Section 16(a) reports, no outside shareholder, like Petitioner, could know the factual information that the Ninth Circuit requires to be set out in the demand.

Rule 23.1 demands differ materially from Section 16(b) demands in at least two respects. First, in a Rule 23.1 suit, the pre-suit demand is meant to "afford the directors an opportunity to exercise their reasonable business judgment." *Kamen*, 500 U.S. at 96. In a Section 16(b) suit, the business judgment of an issuer's board is irrelevant. *Mendell v. Gollust*, 909 F.2d 724, 729 (2d Cir. 1990), *aff'd, Gollust v. Mendell*, 501 U.S. 115 (1991); *Cramer v. Gen. Tel. & Elecs. Corp.*, 582 F.2d 259, 275-76, 276 n.22 (3d Cir. 1978); *Pellegrino v. Nesbit*, 203 F.2d 463, 466-67 (9th Cir. 1953); *see also Segen v. Comvest Venture Partners, LP*, No. CIV.A. 04-822 JJF, 2005 WL 1320875, at *4 (D. Del. June 2, 2005). Although like a derivative claim in the sense that shareholder may initiate a Section 16(b) action for the benefit of an issuer:

> a lawsuit by a security holder on behalf of the issuer under Section 16(b) is not a derivative action. Section 16(b) expressly creates a primary right, not a derivative or secondary

> right, in favor of the issuer and its security holders. Accordingly, unlike a derivative suit, which usually is subject to the business judgment of the board of directors as to whether it will be allowed to proceed, an action under Section 16(b) by a security holder who first made a demand on the issuer may continue without regard to the view of the board.

Romeo & Dye, *supra*, § 9.03[1][a] at 856 (footnotes and citations omitted).

Second, unlike Rule 23.1, governing typical derivative actions, Section 16(b) states the demand requirement explicitly in the statute. The Ninth Circuit overlooked this key difference when it relied on *Kamen* to apply state Rule 23.1 derivative law. *Kamen* addressed the standards for assessing demand futility in a derivative case arising under the Investment Company Act of 1940 ("ICA"). Unlike Section 16(b), the ICA contains no demand requirement. The Court held that where "a gap in the federal securities laws must be bridged by a rule that bears on the allocation of governing powers within a corporation, federal courts should incorporate state law into federal common law unless the particular state law in question is inconsistent with the policies underlying the federal statute." *Kamen*, 500 U.S. at 108. The Ninth Circuit applied this same reasoning to Section 16(b) claims. Appendix A at 52a. However, unlike the ICA, Section 16(b) does contain its own demand requirement, and "the allocation of governing powers within a corporation" is foreign to Section 16(b) enforcement. Congress "intend[ed] to prevent board action from cutting off" Section 16(b) suits. *Burks v. Lasker*, 441 U.S. 471, 484, 485 n.13 (1979). Unlike

Rule 23.1 suits, shareholders have an absolute right to sue under Section 16(b) if the issuer does not do so within 60 days of the demand. This remains true regardless of whether a board's decision not to pursue the Section 16(b) claim was based on an independent and good faith, or a conflicted and bad faith, exercise of its business judgment. 15 U.S.C. § 78p(b); *Pellegrino*, 203 F.2d at 466-67; *see also Segen*, 2005 WL 1320875, at *4.

B. The Ninth Circuit Decision Conflicts with Other Circuits.

The Ninth Circuit acknowledged other federal circuits hold that Rule 23.1 law does not apply in assessing compliance with the demand requirement for Section 16(b) claims. The court maintained that this issue "was not relevant to [its] analysis." Appendix A at 51a n.7. However, the court relied on Rule 23.1 cases to conclude that Petitioner's demands were not sufficient. The court used state derivative law in which the necessity of harm to the corporation and the business judgment rule are fundamental precepts. Neither precept is applicable to Section 16(b). The Ninth Circuit acknowledged this—yet every significant decision on which the court relied is a Rule 23.1 case where the harm to the corporation and its business judgment are fundamental to the analysis on which those cases were decided. The Ninth Circuit eviscerated Section 16(b) enforcement by relying on this body of law, especially here where the insiders have failed to file Section 16(a) reports. Under the Ninth Circuit's decision, insiders can effectively shield themselves from Section 16(b) by not filing Section 16(a) reports.

The Ninth Circuit decision conflicts with the rationales of other circuit decisions. In *Dottenheim v. Murchison*, 227 F.2d 737 (5th Cir. 1956), the Fifth Circuit held that the Rule 23.1 procedural requirements for derivative cases do not apply to analyzing Section 16(b) demand adequacy. As the Fifth Circuit recognizes, Rule 23.1 does not apply to Section 16(b) suits because:

> [Section 16(b)] creates a new cause of action, which, while similar in some respects to a secondary or derivative right, is not such a right at all. It is in reality a primary right. This is so because the statute which creates it makes it so.

Dottenheim, 227 F.2d at 738.[7] The Fourth Circuit and the Second Circuit likewise hold that Rule 23.1 derivative law does not apply in the Section 16(b) context. *Grossman v. Johnson*, 674 F.2d 115, 120 (4th Cir. 1982) (Section 16(b) "embodies its own express

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[7] The issue in *Dottenheim* was whether a Section 16(b) plaintiff must be a stockholder at the time of the challenged transactions, as is required in a derivative suit. *Id.* at 737-38 (referring to Rule 23(b), which is identical to current Rule 23.1). The court explained the distinction between derivative suits to which Rule 23.1 applies and Section 16(b) suits. Section 78aa of the Securities Exchange Act of 1934 vests exclusive federal court jurisdiction in Section 16(b) cases, in contrast to ordinary derivative suits that are based on state law. *Id.* at 739. Rule 23.1 does not apply because Section 16(b) creates a right in the plaintiff "neither derivative nor secondary in the sense in which that term is used in the Rule." *Id.* at 739-40. Furthermore, the court noted that procedural restrictions attendant to derivative actions should not "hamper" the "statutory policy" of Section 16(b) because "the general public is the ultimate beneficiary of that policy." *Id.* at 740 n.5 (citing 15 U.S.C. § 78b).

demand requirement different from that in Rule 23.1"); *Blau v. Mission Corp.*, 212 F.2d 77, 79 (2d Cir. 1954) (state derivative law and Rule 23.1—then Rule 23(b)—"cannot ... override the direct mandate of § 16(b)");[8] *see also Benisch v. Cameron*, 81 F. Supp. 882, 884-85 (S.D.N.Y. 1948) (holding Rule 23.1—then Rule 23(b)—does not apply to Section 16(b) suits because "Congress did not intend procedural restrictions to hamper ... policy" behind the federal legislation).

C. The Ninth Circuit Decision Conflicts with Delaware Law.

The Ninth Circuit decision also conflicts with Delaware law. Delaware federal courts themselves hold that Rule 23.1 does not apply to Section 16(b) claims:

> Demand. Defendants also contend that plaintiff does not have standing for failure to satisfy Fed. R. Civ. P. 23.1's requirements for demand. It is clear, however, that Rule 23.1 does not apply to actions brought pursuant to § 16(b). For example, unlike typical derivative actions, the decision to bring a § 16(b) enforcement action does not enjoy protection of the business judgment rule. *See Cramer v. General Telephone & Elec. Corp.*, 582 F.2d 259, 276 (3d Cir.1978).

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[8] This Court has cited both *Dottenheim* and *Blau* with approval. *See Gollust*, 501 U.S. at 123 (holding Section 16(b) shareholder standing does not require interest in issuer at time of short-swing trading).

DiLorenzo v. Edgar, No. Civ. 03-841-SLR, 2004 WL 609374, at *3 (D. Del. Mar. 24, 2004); *see also Segen*, 2005 WL 1320875, at *4 (D. Del. June 2, 2005) (rejecting application of business judgment rule to Section 16(b) case because shareholder has "absolute right to sue" when issuer does not do so within 60 days of receiving demand).

The Ninth Circuit did not address these Delaware Section 16(b) decisions—which are directly on point. Instead, the court repeatedly relied on an unpublished Delaware Rule 23.1 decision, *Yaw v. Talley*, No. 12882, 1994 WL 89019 (Del. Ch. Mar. 2, 1994). The Ninth Circuit held that Section 16(b) demands must "clearly and specifically" identify insiders' wrongful acts and the specific remedy sought. Appendix A at 63a (citing *Yaw*). Heightened specificity makes sense in a Rule 23.1 derivative action. It makes no sense in a Section 16(b) case where shareholders lack access to the information for such a demand because the targeted insiders failed to file Section 16(a) reports.

D. The Ninth Circuit Decision Hampers Section 16 Enforcement Intended by Congress.

Raising the level of specificity required in a Section 16(b) demand would impede the enforcement scheme Congress designed. Under the Ninth Circuit decision, suits under Section 16(b)—the only federal statute ever enacted by Congress that directly targets insider trading—would be nullified by the insiders' failure to report under Section 16(a). "Effective operation of Section 16(b) is made possible by Section 16(a)'s requirement of full and prompt publicity." *Whittaker*, 639 F.2d at 528. Section 16(a) reports "are an integral

part of the context of § 16 within which § 16(b) must be read." *Id.* They are "essential to the operation of Section 16(b)." Romeo & Dye, *supra*, § 5.02[5] at 400. No outside shareholder, like Petitioner, has access to the data the Ninth Circuit now requires in a demand unless the insider complied with its Section 16(a) reporting obligations. *See id.* These reports are the "main source of information for suits Congress has empowered [shareholders] to bring" under Section 16(b). *Whittaker*, 639 F.2d at 528. They set out the short-swing trading details, identify the insiders and group members, specify the shares in which the insiders have or share a pecuniary interest, and permit computation of the profits to be disgorged. *See* 15 U.S.C. § 78p(a); 17 C.F.R. § 240.16a-1(a)(2); Appendix D. Were Section 16(a) reports filed with the SEC here, Petitioner would have used that information in preparing her demands. However, no reports were filed.

Although Congress requires insiders to file Section 16(a) reports, the Ninth Circuit faulted Petitioner for not specifying this same information in her demands. The statute places the duty on insiders to comply with their Section 16(a) reporting obligations. In the absence of compliance, the outside shareholder will typically never be able to obtain the detail the Ninth Circuit requires. Section 16 only "works by imposing an absolute duty of disclosure upon insiders," which would be impaired if shareholders had "to piece together the substance of [Section 16(a) reports] from disparate sources of information." *Litzler v. CC Inv., L.D.C.*, 362 F.3d 203, 208 (2d Cir. 2004) (quotations omitted).

The Ninth Circuit decision reverses this burden of proof and provides a major disincentive to insiders to comply with Section 16(a). Without Section 16(a) information publicly available, termination of a Section 16(b) claim could always be sought on the basis that the outside shareholder's demand was not sufficiently specific. This is contrary to Congress' intent in enacting Section 16(b) "to curb the evils of insider trading." *Reliance Elec.*, 404 U.S. at 422.

The Ninth Circuit decision allows dismissal for alleged demand insufficiency to be pursued not only by issuers, but also by the very defendants—the insiders—who violated their Section 16(a) reporting obligations. This view is contrary to all other Section 16(b) cases that have addressed the issue. As the leading Section 16(b) commentators note, only issuers have standing to object to a demand; the profiting insiders do not:

> This conclusion is consistent with the language of section 16(b) which contemplates that the demand will go to the corporation, not to the insider. The insider does not have standing in court to attack the demand even if the issuer wrote the plaintiff a letter objecting to the demand.

Jacobs, *supra*, at 585 (citing numerous cases) (footnotes omitted).

> [N]umerous courts have held that only the issuer has standing to object to a security holder's failure to comply with [the demand requirement]. . . . Thus, an insider's efforts to object to a security holder's noncompliance with

> the demand requirement will be fruitless, even when the insider can demonstrate that the issuer has objected to the demand in a letter.

Romeo & Dye, *supra*, § 9.03[2][b][v] at 866-67 (citing numerous cases) (footnotes omitted).

The Ninth Circuit decision went so far as to ***direct*** the district court on remand to permit the Underwriters—the targeted insiders—to seek dismissal even in the 24 cases where Issuers did not seek dismissal or object to Petitioner's demand. Appendix A at 71a and n.22. "Leaving insiders to police themselves is not only contrary to § 16(b)'s private shareholder enforcement purpose, but also can be expected to secure the same results as those obtained when a fox guards a chicken coop." *Mendell*, 909 F.2d at 729.

II. RULE 23.1 DERIVATIVE LAW DOES NOT GOVERN QUESTIONS OF DEMAND FUTILITY UNDER SECTION 16(b).

Moving Issuers indisputably do not want to prosecute these actions. Moving Issuers had all publicly-available information relevant to the Section 16(b) claims yet sought to terminate them with prejudice. They continue this quest on appeal.[9] There is no dispute Petitioner has demonstrated demand futility.

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[9] An issuer's prosecution of a Section 16(b) suit "may often be less than vigorous," because of the reluctance of an issuer to take action against its own insiders. *Pellegrino*, 203 F.2d at 467.

The Ninth Circuit erred in its brief analysis of demand futility because, again, it allowed Rule 23.1 to govern its analysis. The Ninth Circuit stated:

> Delaware courts have repeatedly held that a shareholder concedes that a demand is not futile by submitting a demand to the board. *"Delaware law could hardly be clearer"* in holding that shareholders may not invoke the futility exception after submitting a demand to the board.

Appendix A at 64a (citing *FLI Deep Marine LLC v. McKim*, No. 4138-VCN, 2009 WL 1204363, at *3 (Del. Ch. Apr. 21, 2009) (emphasis added).

In a Rule 23.1 suit, a demand is meant to "afford the directors an opportunity to exercise their reasonable business judgment." *Kamen*, 500 U.S. at 96. "[T]he entire question of demand futility is inextricably bound to issues of business judgment and the standards of that doctrine's applicability." *Id.* at 103; *see also Spiegel v. Buntrock*, 571 A.2d 767, 774-75 (Del. 1990). These Rule 23.1 principles are echoed extensively in the unpublished *FLI Deep Marine* case on which the Ninth Circuit relied. In a Rule 23.1 case, a shareholder cannot argue demand futility if he serves a demand because serving the demand operates to concede the board's independence to properly exercise its business judgment. *FLI Deep Marine*, 2009 WL 1204363, at *3. It was this point of state Rule 23.1 jurisprudence on which Delaware law "could hardly be clearer."

None of these principles applies under Section 16(b). A shareholder does not "concede" the ability to

alternatively argue demand futility by complying with Section 16(b)'s explicit demand requirement. Unlike Rule 23.1, the business judgment and independence of the issuer's board have no bearing on a shareholder's standing to initiate a Section 16(b) suit. Unlike Rule 23.1, demand futility under Section 16(b) is based entirely on whether the board will, or will not, pursue the claim. Unlike Rule 23.1, this is true regardless of the board's independence or business judgment in arriving at its decision. In a Section 16(b) suit, the business judgment of an issuer's board is irrelevant:

> Appellees rely upon the general rule that a corporation's board of directors may, subject to the exercise of good faith and a reasonable business judgment, determine whether the best interests of the corporation and its stockholders would be served by engaging in litigation. This argument ignores the limitations imposed upon the usual discretion of a board of directors by the language of Sec. 16(b). Any stockholder has a right to institute suit if the corporation fails to do so, regardless of the good faith or reasonable business judgment of the board of directors.

Pellegrino, 203 F.3d at 466-47; *see also Mendell*, 909 F.2d at 729; *Segen*, 2005 WL 1320875, at *4; *DiLorenzo*, 2004 WL 609374, at *3. Whether entirely independent or blatantly self interested, an issuer's board that decides not to diligently prosecute a Section 16(b) claim cannot prevent a shareholder from doing so.

III. THE NINTH CIRCUIT'S *SUA SPONTE* DECISION TO DISMISS WITH PREJUDICE FOR PRE-SUIT DEMAND INADEQUACY CONFLICTS WITH RULE 15(a) AND A FIRST CIRCUIT DECISION.

The Ninth Circuit concluded *sua sponte* that all 54 complaints should be dismissed with prejudice as a result of its conclusion about pre-suit demand insufficiency. Yet only 30 of the 54 issuers moved for dismissal, and none of them articulated this argument.[10] The remaining 24 issuers, who received similar demands, did not even seek dismissal. They apparently found Petitioner's demand provided sufficient notice of the claim. For example, after receiving its demand, one non-moving issuer amended its merger documents to give shareholders a continuing interest in the outcome of this litigation.

The *sua sponte* decision to convert a dismissal "without prejudice" to "with prejudice" on appeal conflicts with the well-established view that courts must follow Federal Rule of Civil Procedure 15(a) and grant leave to amend "freely" "when justice so requires." *Foman v. Davis*, 371 U.S. 178, 182 (1962). This Court has stated "this mandate is to be heeded."

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[10] With their cross-appeal, Moving Issuers contended that Petitioner's claims against them should be dismissed with prejudice in the event the Ninth Circuit concluded the claims were time barred. Petitioner agreed with this position; that is, a dismissal for failure to meet the statute of limitations is on the merits and should result in a dismissal with prejudice. The Ninth Circuit, however, concluded Petitioner's claims were not time barred and did not render any decision on the merits. It nonetheless dismissed the Petitioner's claims with prejudice.

Id. The Ninth Circuit itself has "repeatedly held" that courts should grant leave to amend "even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.'" *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000). The Ninth Circuit never made such a determination here. To the contrary, the court implies that the allegations set out in Petitioner's complaint would have been sufficient were they set out in Petitioner's demand. Appendix A at 60a-61a (comparing demand letter allegations with those in Petitioner's complaint). In this circumstance, where the procedural defect would be cured, justice is not served by a dismissal with prejudice.

The *sua sponte* conversion of the dismissals of the underlying claim without prejudice to dismissals with prejudice conflicts with the First Circuit Rule 23.1 derivative case, *In re Kauffman Mutual Fund Actions*, 479 F.2d 257, 267 (1st Cir. 1973), upon which the Ninth Circuit principally relied. *Kauffman* involved a plaintiff who did not serve a demand before filing suit, and the derivative litigation turned on whether he could establish demand futility. The court held that when futility has been adjudicated and resolved against the plaintiff who did not make a demand, dismissal should be with prejudice as to relitigating demand futility. However, the dismissal should be without prejudice as to the underlying claim:[11]

> The dismissal is with prejudice on the issue of the obligation to make a demand on the

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[11] The issue was the same in the other five Rule 23.1 cases the Ninth Circuit cited without discussion.

> directors with respect to that substantive complaint. The principle applies that "[a]lthough, where a judgment for the defendant is not on the merits, ***the plaintiff is not precluded from maintaining a new action on the same cause of action***, he is precluded from relitigating the very question which was litigated in the prior action."

Kauffman, 479 F.2d at 267 (emphasis added) (citations omitted).

In other words, the *Kauffman* plaintiff on remand was free to serve a new demand and bring a new suit if the corporation did not prosecute the case itself. The "dismissal with prejudice" merely precluded the plaintiff from again filing a new suit without serving a demand and relitigating demand futility.

The Ninth Circuit concluded that Petitioner's claims were not barred by the statute of limitations. It did not render any other decision on the merits of Petitioner's claims. In the event the demands are deemed inadequate, even under a Rule 23.1 case like *Kauffman*, Petitioner should be free (like the *Kauffman* plaintiff) to serve new demands to "cure" this procedural defect.

CONCLUSION

These Section 16(b) insider-trading cases raise fundamental questions of national importance about the basic enforcement and operation of the only direct anti-insider-trading legislation ever enacted by Congress. The Ninth Circuit decision does what every other circuit facing the issue over the 77-year history

of Section 16(b) has refused to do—import Rule 23.1 jurisprudence to assess the adequacy and futility of a Section 16(b) demand where the targeted insiders failed to comply with their Section 16(a) reporting obligations. In doing so, the Ninth Circuit eviscerates the ability of issuer shareholders to protect the integrity of the financial markets through enforcement of Section 16(b) as Congress intended.

For the foregoing reasons, Ms. Simmonds respectfully requests that this Court grant her petition and review this matter.

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APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed December 12, 2010]
[Opinion Amended January 18, 2011]
[Caption Second Amendment January 25, 2011]

VANESSA SIMMONDS, *Plaintiff-Appellant,*	)	
v.	)	
CREDIT SUISSE SECURITIES (USA) LLC; JPMORGAN CHASE & CO., a Delaware corporation, successor in interest to Hambrecht & Quist and Chase Securities Inc.; BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to Fleetboston Robertson Stephens, Inc.; ONVIA INC., a Delaware corporation formerly known as Onvia.com Inc.; ROBERTSON STEPHENS, INC.; J.P. MORGAN SECURITIES INC., *Defendants-Appellees.*	)	No. 09-35262 No. 09-35363 D.C. No. 2:07-cv-01549-JLR WesternDistrict of Washington, Seattle
In Re: SECTION 16(b) LITIGATION	)	

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. DEUTSCHE BANK SECURITIES INC.; FOUNDRY NETWORKS INC., Nominal Defendant, a Delaware corporation; MERRILL LYNCH PIERCE FENNER & SMITH INCORPORATED; J.P. MORGAN SECURITIES INC., *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35280 D.C. Nos. 2:07-cv-01566- JLR 2:07-cv-01549- JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. MERRILL LYNCH & CO. INC., *Defendant,* and FINISAR CORPORATION, Nominal Defendant, a Delaware corporation; MERRILL LYNCH PIERCE FENNER & SMITH INCORPORATED; J.P. MORGAN SECURITIES INC., *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35282 No. 09-35375 D.C. Nos. 2:07-cv-01567-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. MORGAN STANLEY & CO., INCORPORATED; LEHMAN BROTHERS, INC.; BANK OF AMERICA CORPORATION; ROBERTSON STEPHENS, INC.; AVANEX CORPORATION, *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35285 D.C. Nos. 2:07-cv-01568-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,*	)	
v.	)	
CREDIT SUISSE GROUP, a global bank headquartered in Zurich, Switzerland formerly known as Credit Suisse First Boston Corporation; BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; TIVO INC., Nominal Defendant, a Delaware corporation; ROBERTSON STEPHENS, INC., *Defendants-Appellees.*	)	No. 09-35286 No. 09-35367 D.C. Nos. 2:07-cv-01576-JLR 2:07-cv-01549-JLR
In Re: SECTION 16(b) LITIGATION	)	

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. GOLDMAN SACHS & CO., a New York limited partnership; BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to FleetBoston Robertson Stephens, Inc.; ROBERTSON STEPHENS INC., a Massachusetts corporation, *Defendants-Appellees,* and TURNSTONE SYSTEMS, INC., a Delaware corporation, *Defendant.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35288 D.C. Nos. 2:07-cv-01569-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. GOLDMAN SACHS & CO., "Goldman Sachs"; CREDIT SUISSE SECURITIES (USA) LLC, "Credit Suisse" formerly known as Credit Suisse First Boston Corporation; BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; ROBERTSON STEPHENS, INC.; JUNIPER NETWORKS INC., *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35289 D.C. Nos. 2:07-cv-01577-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. MORGAN STANLEY & CO., INCORPORATED; DEUTSCHE BANK SECURITIES, INC.; MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED; ARIBA INC., *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35290 No. 09-35381 D.C. Nos. 2:07-cv-01570-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,*	)	
	)	No. 09-35292
v.	)	No. 09-35364
	)	D.C. Nos.
	)	2:07-cv-01571-JLR
MORGAN STANLEY & CO., INCORPORATED; CITIGROUP GLOBAL MARKETS, INC.; AKAMAI TECHNOLOGIES, INC., *Defendants-Appellees.*	)	2:07-cv-01549-JLR
In Re: SECTION 16(b) LITIGATION	)	

VANESSA SIMMONDS, *Plaintiff-Appellant,*	)	
v.	)	
GOLDMAN SACHS GROUP INC., a Delaware corporation; JPMORGAN CHASE & CO., a Delaware corporation, successor in interest to Hambrecht & Quist LLC, *Defendants,*	)	No. 09-35293 D.C. Nos. 2:07-cv-01578-JLR
and	)	2:07-cv-01549-JLR
KANA SOFTWARE INC., Nominal Defendant, a Delaware corporation formerly known as Kana Communications Inc.; GOLDMAN SACHS & CO.; J.P. MORGAN SECURITIES INC., *Defendants-Appellees.*	)	
In Re: SECTION 16(b) LITIGATION	)	

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. MORGAN STANLEY, a Delaware corporation, successor in interest to Morgan Stanley Dean Witter, *Defendant,* and SILICON LABORATORIES INC., Nominal Defendant, a Delaware corporation; MORGAN STANLEY & CO. INCORPORATED; LEHMAN BROTHERS INC.; CITIGROUP GLOBAL MARKETS, INC., *Defendants-Appellees,* JAMES W. GIDDENS, TRUSTEE FOR THE LIQUIDATION OF THE BUSINESS OF LEHMAN BROTHERS INC., *Trustee-Appellee.* *In Re: SECTION 16(b) LITIGATION*	No. 09-35297 No. 09-35373 D.C. Nos. 2:07-cv-01590-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,*	)	
v.	)	
GOLDMAN SACHS GROUP INC., a Delaware corporation, *Defendant,*	)	
and	)	No. 09-35300
	)	D.C. Nos.
BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; PALM INC., Nominal Defendant, a Delaware corporation; GOLDMAN SACHS & CO.; MORGAN STANLEY & CO. INCORPORATED; MERRILL LYNCH PIERCE FENNER & SMITH INCORPORATED; ROBERTSON STEPHENS, INC., *Defendants-Appellees.*	)	2:07-cv-01593-JLR
	)	2:07-cv-01549-JLR
In Re: SECTION 16(b) LITIGATION	)	

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. GOLDMAN SACHS GROUP INC., *Defendant,* and BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; MAXYGEN INC., Nominal Defendant, a Delaware corporation; GOLDMAN SACHS & CO.; ROBERTSON STEPHENS, INC., *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35301 No. 09-35374 D.C. Nos. 2:07-cv-01594-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. CREDIT SUISSE GROUP, a global bank headquartered in Zurich, Switzerland FKA Credit Suisse First Boston Corporation; BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; SILICON IMAGE, INC., Nominal Defendant, a Delaware corporation; ROBERTSON STEPHENS, INC., *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35302 D.C. No. 2:07-cv-01575-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,*	)	
v.	)	
	)	No. 09-35303
	)	No. 09-35391
GOLDMAN SACHS GROUP INC., a Delaware corporation, *Defendant,*	)	D.C. Nos. 2:07-cv-01595-JLR
	)	2:07-cv-01549-JLR
and	)	
STREET.COM INC.; GOLDMAN SACHS & CO.; J.P. MORGAN SECURITIES INC., *Defendants-Appellees.*	)	
In Re: SECTION 16(b) LITIGATION	)	

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; CRITICAL PATH, INC., Nominal Defendant, a California corporation; ROBERTSON STEPHENS, INC.; J.P. MORGAN SECURITIES, INC., *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35306 D.C. No. 2:07-cv-01582-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; CONCUR TECHNOLOGIES, INC., a Delaware corporation; ROBERTSON STEPHENS, INC.; J.P. MORGAN SECURITIES, INC., *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35307 D.C. Nos. 2:07-cv-01585-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. CREDIT SUISSE GROUP, a global bank headquartered in Zurich, Switzerland; SOURCEFORGE, INC., Nominal Defendant, a Delaware corporation, FKA VA Linux Systems, Inc.; LEHMAN BROTHERS, INC., *Defendants-Appellees,* JAMES W. GIDDENS, Trustee for the Liquidation of the Business of Lehman Brothers, Inc., *Trustee-Appellee.* *In Re: SECTION 16(b) LITIGATION*	No. 09-35308 D.C. No. 2:07-cv-01583-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. GOLDMAN SACHS & CO.; J.P. MORGAN SECURITIES, INC.; RED HAT, INC., a Delaware corporation, *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	No. 09-35309 No. 09-35369 D.C. Nos. 2:07-cv-01587-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,*	)	
v.	)	
	)	No. 09-35310
CREDIT SUISSE GROUP, a global bank headquartered in Zurich, Switzerland; SELECTICA, INC., Nominal Defendant, a Delaware corporation, *Defendants-Appellees.*	)	No. 09-35368 D.C. No. 2:07-cv-01584-JLR
In Re: SECTION 16(b) LITIGATION	)	

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. CREDIT SUISSE GROUP SECURITIES (USA) LLC, a Delaware limited liability company; BANK OF AMERICA CORPORATION, a Delaware corporation; ROBERTSON STEPHENS, INC., a Massachusetts corporation, *Defendants-Appellees,* and INTERWOVEN, INC., *Defendant.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35312 D.C. Nos. 2:07-cv-01579-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS *Plaintiff-Appellant,* v. MORGAN STANLEY & CO., INCORPORATED; J.P. MORGAN SECURITIES, INC.; VIGNETTE CORPORATION, a Delaware corporation, *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35313 No. 09-35370 D.C. Nos. 2:07-cv-01588-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS *Plaintiff-Appellant,*	)	
v.	)	No. 09-35314 No. 09-35371
MORGAN STANLEY & CO., INCORPORATED; J.P. MORGAN SECURITIES, INC.; LEHMAN BROTHERS, INC.; SYCAMORE NETWORKS, INC., a Delaware corporation, *Defendants-Appellees.*	)	D.C. Nos. 2:07-cv-01589-JLR 2:07-cv-01549-JLR
In Re: SECTION 16(b) LITIGATION	)	

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. CREDIT SUISSE GROUP SECURITIES (USA) LLC, a Delaware limited liability company; BANK OF AMERICA CORPORATION, a Delaware corporation; ROBERTSON STEPHENS, INC.; J.P. MORGAN SECURITIES INC., a Delaware corporation, *Defendants-Appellees*, and OPENWAVE SYSTEMS, INC., a California corporation, *Defendant*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35315 D.C. No. 2:07-cv-01580-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,*	)	
v.	)	No. 09-35316
	)	D.C. Nos.
CREDIT SUISSE GROUP SECURITIES (USA) LLC, a Delaware limited liability company; BANK OF AMERICA CORPORATION, a Delaware corporation; ROBERTSON STEPHENS, INC., *Defendants-Appellees,*	)	2:07-cv-01581-JLR
	)	2:07-cv-01549-JLR
and	)	
INFORMATICA CORPORATION, a Delaware corporation, *Defendant.*	)	
In Re: SECTION 16(b) LITIGATION	)	

VANESSA SIMMONDS, *Plaintiff-Appellant,*	
v.	
CREDIT SUISSE GROUP SECURITIES (USA) LLC, a Delaware limited liability company; BANK OF AMERICA CORPORATION, a Delaware corporation; ROBERTSON STEPHENS, INC., a Massachusetts corporation; MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, a Delaware corporation; CITIGROUP GLOBAL MARKETS INC., a New York corporation, *Defendants-Appellees,*	No. 09-35317 No. 09-35365 D.C. Nos. 2:07-cv-01572-JLR 2:07-cv-01549-JLR
and	
INTERSIL CORPORATION, a Delaware corporation, *Defendant.*	
In Re: SECTION 16(b) LITIGATION	

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. GOLDMAN SACHS GROUP INC., *Defendant,* and BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to Fleetboston Robertson Stephens, Inc.; SONUS NETWORKS INC., a Delaware corporation; GOLDMAN SACHS & CO.; LEHMAN BROTHERS INC.; ROBERTSON STEPHENS, INC.; J.P. MORGAN SECURITIES INC., *Defendants-Appellees,* JAMES W. GIDDENS, TRUSTEE FOR THE LIQUIDATION OF THE BUSINESS OF LEHMAN BROTHERS INC., *Trustee-Appellee.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35318 No. 09-35393 D.C. Nos. 2:07-cv-01597-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*,	)	
v.	)	
MORGAN STANLEY & CO., INCORPORATED; J.P. MORGAN SECURITIES, INC., a Delaware corporation; LEHMAN BROTHERS, INC., a Delaware corporation,	)	No. 09-35320 No. 09-35366
Defendants-Appellees,	)	D.C. No. 2:07-cv-01573-JLR
and	)	
AVICI SYSTEMS, INC., a Delaware corporation, *Defendant*.	)	
In Re: SECTION 16(b) LITIGATION	)	

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; PRICELINE.COM INC., a Delaware corporation; MORGAN STANLEY & CO. INCORPORATED; MERRILL LYNCH PIERCE FENNER & SMITH INCORPORATED; ROBERTSON STEPHENS, INC., *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35321 No. 09-35397 D.C. Nos. 2:07-cv-01598-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. GOLDMAN SACHS & CO.; LEHMAN BROTHERS, INC.; J.P. MORGAN SECURITIES, INC.; MARVELL TECHNOLOGY GROUP, LTD., a Bermuda corporation, *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35322 D.C. Nos. 2:07-cv-01632-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,*	)	
v.	)	
	)	No. 09-35323
MORGAN STANLEY & CO., INCORPORATED; MERRILL LYNCH PIERCE FENNER & SMITH INCORPORATED; PEROT SYSTEMS CORPORATION, a Delaware corporation, *Defendants-Appellees.*	)	No. 09-35404 D.C. Nos. 2:07-cv-01631-JLR 2:07-cv-01549-JLR
In Re: SECTION 16(b) LITIGATION	)	

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. CREDIT SUISSE GROUP, a global bank headquartered in Zurich, Switzerland; DEUTSCHE BANK AG, a global bank headquartered in Frankfurt, Germany; LEHMAN BROTHERS HOLDINGS, INC., a Delaware corporation; AIRSPAN NETWORKS, INC., Nominal Defendant, a Washington corporation; DEUTSCHE BANK SECURITIES, INC.; LEHMAN BROTHERS, INC., *Defendants-Appellees,* and JAMES W. GIDDENS, Trustee for the Liquidation of the Business of Lehman Brothers, Inc., *Trustee-Appellee.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35324 D.C. No. 2:07-cv-01638-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. GOLDMAN SACHS & CO.; BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest BancBoston Robertson Stephens Inc.; ROBERTSON STEPHENS, INC.; INSWEB CORPORATION, a Delaware corporation, *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35325 D.C. Nos. 2:07-cv-01630-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. MORGAN STANLEY & CO., INCORPORATED; DEUTSCHE BANK SECURITIES, INC.; ASIAINFO HOLDINGS, INC., a Delaware corporation, *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35326 No. 09-35405 D.C. Nos. 2:07-cv-01633-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc. and FleetBoston Roberton Stephens, Inc.; ROBERTSON STEPHENS, INC.; J.P. MORGAN SECURITIES, INC.; KEYNOTE SYSTEMS, INC., a Delaware corporation, *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35328 D.C. Nos. 2:07-cv-01634- JLR 2:07-cv-01549- JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; ROBERTSON STEPHENS, INC.; J.P. MORGAN SECURITIES INC.; DIGIMARC CORPORATION, Nominal Defendant, a Delaware corporation, *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35327 No. 09-35382 D.C. No. 2:07-cv-01652-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. GOLDMAN SACHS & CO.; BEAR STEARNS & CO., INC.; DEUTSCHE BANK SECURITIES, INC.; TIBCO SOFTWARE, INC., a Delaware corporation, *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35331 D.C. Nos. 2:07-cv-01635-JLR 2:07-cv-11549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. MARTHA STEWART LIVING OMNIMEDIA INC., a Delaware corporation; MORGAN STANLEY & CO. INCORPORATED; MERRILL LYNCH PIERCE FENNER & SMITH INCORPORATED, *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	No. 09-35333 No. 09-35380 D.C. Nos. 2:07-cv-01605-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. CREDIT SUISSE GROUP, a global bank headquartered in Zurich, Switzerland; AUDIBLE INC., a Delaware corporation; J.P. MORGAN SECURITIES INC., *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	No. 09-35334 No. 09-35383 D.C. Nos. 2:07-cv-01623-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. GOLDMAN SACHS & CO., a New York limited partnership; MERRILL LYNCH PIERCE FENNER & SMITH INCORPORATED, a Delaware corporation; BANK OF AMERICA CORPORATION, a Delaware corporation, ROBERTSON STEPHENS, INC., a Massachusetts corporation, *Defendants-Appellees,* and SABA SOFTWARE, INC., a Delaware corporation, *Defendant.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35335 No. 09-35377 D.C. Nos. 2:07-cv-01637-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. MORGAN STANLEY & CO. INCORPORATED, a Delaware corporation; DEUTSCHE BANK SECURITIES INC., a Delaware corporation; CITIGROUP GLOBAL MARKETS, INC., a New York corporation, *Defendants-Appellees,* and TRANSMETA CORPORATION, a Delaware corporation, *Defendant.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35337 D.C. Nos. 2:07-cv-01636-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,*	)	
v.	)	No. 09-35339
	)	No. 09-35395
CAPSTONE TURBINE CORPORATION, a Delaware corporation; GOLDMAN SACHS & CO.; MERRILL LYNCH PIERCE FENNER & SMITH INCORPORATED; MORGAN STANLEY & CO. INCORPORATED, *Defendants-Appellees.*	)	D.C. Nos. 2:07-cv-01624-JLR 2:07-cv-01549-JLR
In Re: SECTION 16(b) LITIGATION	)	

VANESSA SIMMONDS, *Plaintiff-Appellant,*	)	
v.	)	No. 09-35344
	)	D.C. Nos.
MORGAN STANLEY & CO. INCORPORATED; BROCADE COMMUNICATIONS SYSTEMS INC., a Delaware corporation, *Defendants-Appellees.*	)	2:07-cv-01626-JLR 2:07-cv-01549-JLR
In Re: SECTION 16(b) LITIGATION	)	

VANESSA SIMMONDS, *Plaintiff-Appellant,*	)	
v.	)	
BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to Robertson Stephens, Inc.; J.P. MORGAN SECURITIES INC.; ROBERTSON STEPHENS, INC.; OPLINK COMMUNICATIONS, INC., a Delaware corporation, *Defendants-Appellees.*	)	No. 09-35345 No. 09-35399 D.C. Nos. 2:07-cv-01667-JLR 2:07-cv-01549-JLR
In Re: SECTION 16(b) LITIGATION	)	

VANESSA SIMMONDS, *Plaintiff-Appellant,*	)	
v.	)	
BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; ROBERTSON STEPHENS, INC.; J.P. MORGAN SECURITIES INC.; NAVASITE, INC., a Delaware corporation, *Defendants-Appellees.*	)	No. 09-35346 No. 09-35398 D.C. No. 2:07-cv-01666-JLR
In Re: SECTION 16(b) LITIGATION	)	

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. MORGAN STANLEY & CO. INCORPORATED, a Delaware corporation; DEUTSCHE BANK SECURITIES, INC., a Delaware Corporation; ASPECT MEDICAL SYSTEMS, INC., Nominal Defendant, a Delaware corporation, *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35347 No. 09-35394 D.C. No. 2:07-cv-01655-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; ROBERTSON STEPHENS, INC.; BEAR STEARNS & CO., INC.; PACKETEER, INC., Nominal Defendant, a Delaware corporation, *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35348 No. 09-35387 D.C. No. 2:07-cv-01654-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to Fleetboston Robertson Stephens, Inc.; ROBERTSON STEPHENS, INC.; OMNIVISION TECHNOLOGIES, INC., a Delaware corporation, *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35349 D.C. Nos. 2:07-cv-01668-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. CREDIT SUISSE SECURITIES (USA), LLC; OCCAM NETWORKS, INC., a Delaware corporation, FKA Accelerated Networks, Inc., *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35350 No. 09-35400 D.C. Nos. 2:07-cv-01669-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,*	)	
v.	)	
	)	No. 09-35351
J.P. MORGAN SECURITIES INC.; BEAR STEARNS & CO., INC.; BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to Bancboston Robertson Stephens, Inc.; ROBERTSON STEPHENS, INC.; IMMERSION CORPORATION, a Delaware corporation, *Defendants-Appellees.*	)	D.C. Nos. 2:07-cv-01670-JLR 2:07-cv-01549-JLR
In Re: SECTION 16(b) LITIGATION	)	

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. MORGAN STANLEY & CO. INCORPORATED, a Delaware corporation; CREDIT SUISSE SECURITIES (USA), LLC; J.P. MORGAN SECURITIES, INC.; INTERNAP NETWORK SERVICES CORPORATION, Nominal Defendant, a Delaware corporation, *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35352 No. 09-35384 D.C. No. 2:07-cv-01653-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. MICROTUNE INC., a Delaware corporation; GOLDMAN SACHS & CO.; J.P. MORGAN SECURITIES INC., *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35355 D.C. No. 2:07-cv-01627-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; MORGAN STANLEY & CO. INCORPORATED; ROBERTSON STEPHENS, INC.; EXTREME NETWORKS INC., *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35357 D.C. Nos. 2:07-cv-01628-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to Robertson Stephens, Inc.; J.P. MORGAN SECURITIES INC.; ROBERTSON STEPHENS, INC.; COSINE COMMUNICATIONS INC., a Delaware corporation; GOLDMAN SACHS & CO., *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	)	No. 09-35358 No. 09-35390 D.C. Nos. 2:07-cv-01629-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,*	)	
v.	)	
	)	No. 09-35363
CREDIT SUISSE SECURITIES (USA) LLC; CREDIT SUISSE SECURITIES (USA) LLC; J.P. MORGAN SECURITIES INC.; BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to Fleetboston Robertson Stephens, Inc.; ROBERTSON STEPHENS, INC., *Defendants-Appellants.*	)	D.C. Nos. 2:07-cv-01549-JLR 2:07-cv-01549-JLR
In Re: SECTION 16(b) LITIGATION	)	ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Western District of Washington
James L. Robart, District Judge, Presiding

Argued and Submitted October 5, 2010
Seattle, Washington

Before: Sidney R. Thomas and Milan D. Smith, Jr.,
Circuit Judges, and Michael R. Hogan,
District Judge.[1]

[1] The Honorable Michael R. Hogan, United States District Judge for the District of Oregon, sitting by designation.

Opinion by Judge Milan D. Smith, Jr.;
Concurrence by Judge Milan D. Smith, Jr.

COUNSEL

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ORDER

The Opinion filed on December 2, 2010 is amended to appear as set forth below in the Amended Opinion filed concurrently with this Order.

On slip opinion page 19110, footnote 5, lines 5 and 6, "Digimarc Corporation;" is deleted.

On slip opinion page 19110, footnote 5, line 8, "Openwave Systems Inc.;" is deleted.

On slip opinion page 19124, lines 16 through 27, the text beginning with "If Simmonds lacked access to necessary information" through the end of the paragraph is deleted and replaced with the following: "Delaware law does not allow shareholders to forego pre-suit investigations in an attempt to shift information-gathering costs onto the corporation, and this rule is not clearly incompatible with Section 16 and the Exchange Act."

On slip opinion page 19124, line 28, through page 19125, line 11, the paragraph is deleted in its entirety.

With this amendment, the panel has unanimously voted to deny Appellees' petition for panel rehearing. Judges Thomas and M. Smith have voted to deny Appellant's petition for rehearing en banc, and Judge Hogan has so recommended. Judge Thomas has voted to deny Appellees' petition for rehearing en banc, and Judge Hogan has so recommended. Judge M. Smith has voted to grant Appellees' petition for rehearing en banc.

The full court has been advised of the petitions for rehearing en banc, and no judge of the court has requested a vote on them. Fed. R. App. P. 35.

The petition for rehearing and petitions for rehearing en banc are DENIED. No further petitions for rehearing may be filed.

OPINION

M. SMITH, Circuit Judge:

Plaintiff-Appellant Vanessa Simmonds appeals the district court's dismissal of fifty-four related derivative complaints brought under Section 16(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. § 78p(b). Simmonds's complaints allege that the Defendant-Appellee investment banks (collectively, Underwriters) violated Section 16(b) by engaging in prohibited "short-swing" transactions in connection with the Initial Public Offerings (IPOs) of the fifty-four Defendant-Appellee corporations (collectively, Issuing Companies) between 1999 and 2000. Simmonds seeks disgorgement of the Underwriters' alleged short-swing trading profits.

We affirm the district court's conclusion (rendered in the thirty cases in which the issue was raised) that Simmonds failed to present an adequate demand letter to the Issuing Companies prior to filing her lawsuits, and we remand these cases to the district court to dismiss the complaints with prejudice. We reverse the district court's conclusion that the remaining twenty-four cases are barred by Section 16(b)'s two-year statute of limitations, and we remand these cases to

the district court so that all defendants, including the Underwriters, have a full opportunity to contest the adequacy of Simmonds's demand letters with respect to the remaining twenty four cases.

FACTUAL AND PROCEDURAL BACKGROUND

In her First Amended Complaints (Complaints), Simmonds alleges that while the Underwriters were acting as lead underwriters on the Issuing Companies' IPOs, they coordinated their activities with the Issuing Companies' officers, directors, and principal shareholders (collectively, Insiders) in order to obtain financial benefits from post-IPO increases in the Issuing Companies' stock prices.[1] Simmonds alleges that the Insiders entered "lock-up agreements" with the Underwriters that prevented the Insiders from offering or selling their stock for 180 days following the IPO. The purpose of the lock-up agreements was to "collectively hold[ ] . . . and refrain[ ] from selling" the Insiders' shares, and the Underwriters and Insiders intended to receive financial benefits by selling these shares into an inflated market after the lock-up agreements expired. In order to create this inflated market, the Underwriters and Insiders allegedly agreed to release the IPO to the general public at a discount to the price that "they knew to be the likely aftermarket price range . . . based on clear indications of IPO and aftermarket demand." The Underwriters also allegedly inflated the post-IPO share prices by engaging in a practice known as "laddering"—in exchange for giving their customers access to IPO

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[1] The appeals have been stayed as to Defendant Lehman Brothers, Inc. pending resolution of its bankruptcy proceedings.

allocations, the Underwriters required their customers (including the Issuing Companies' Insiders) to purchase shares "at progressively higher prices" following the IPO.[2] Finally, Simmonds asserts that the Underwriters engaged in "improper research-related activities that were designed to inflate the market price" of the shares.[3] According to Simmonds, these allegations establish that the Underwriters and Insiders acted as a group and coordinated their conduct with respect to acquiring the Issuing Companies' stock, holding the stock, and disposing of the stock "so as to share in the profits gained in the aftermarket following the IPO."

Simmonds alleges that the Underwriters had three types of "direct or indirect pecuniary interest[s]" in the Issuing Companies' stock that allowed the Underwriters to "profit[ ] from purchases and sales, or sales and purchases" of that stock. (The Complaints define these transactions as the operative "Short-Swing Transactions" for purposes of these lawsuits.) First, the Underwriters "shar[ed] in the profits of customers to whom they made IPO allocations" of the

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[2] "Laddering . . . is a practice that involves requiring IPO purchasers to commit to purchase additional shares in the after-market. Laddering not only provides improper consideration for the allocation of IPO shares, but also creates additional demand in the aftermarket, designed to insure rising prices once the shares are publicly traded." 2 Thomas Lee Hazen, *Law of Securities Regulation* § 6.0 (6th ed. Supp. 2010) (hereinafter Hazen).

[3] Some of the Complaints include specific factual details regarding the Underwriters' publication of favorable ratings on the Issuing Companies' stock. In addition, some of the Complaints describe the Underwriters' participation in secondary stock offerings.

Issuing Companies' stock. Second, the Underwriters "allocat[ed] shares of [the Issuing Companies'] stock to executives and other high-level insiders of other companies, both private and public, from which [the Underwriters] expected to receive new or additional investment banking business in return." Finally, the Underwriters "creat[ed] the opportunity for other members of the [g]roup to derive personal financial benefits from the sale of the [the Issuing Companies'] stock into an inflated market, in an effort by [the Underwriters] to obtain future investment banking business from [the Issuing Companies]."[4]

In her Complaints, Simmonds seeks to compel the Underwriters to disgorge the profits they received from these "Short-Swing Transactions." Simmonds alleges that prior to filing the Complaints, she submitted demand letters insisting that the Issuing Companies seek this relief directly (as is their right under Section 16(b)). When more than sixty days had lapsed after she sent the demand letters, Simmonds filed the Complaints at issue in this appeal.

The Underwriters jointly filed a motion to dismiss Simmonds's Complaints under Fed. R. Civ. P. 12(b)(6). The Underwriters contended that Simmonds's claims were time-barred, that Simmonds's Complaints failed to state a cause of action under Section 16(b), and that the Underwriters are protected by various exemptions from Section 16(b). Thirty of the Issuing Companies

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[4] The final two activities are commonly known as "spinning," which is "[t]he giving of shares or preferred opportunities to buy shares in an initial public offering to key investment-banking clients in order to solicit or retain profitable business in the future." *Black's Law Dictionary* 1531 (9th ed. 2009).

(collectively, Moving Issuers) filed a separate motion to dismiss under Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6).[5] The Moving Issuers argued that Simmonds's claims were time-barred and that Simmonds lacked standing because she failed to submit adequate demand letters to the Issuing Companies prior to filing suit.

The district court granted the Moving Issuers' Fed. R. Civ. P. 12(b)(1) motions to dismiss based on the inadequacy of Simmonds's demand letters, and granted the Underwriters' Fed. R. Civ. P. 12(b)(6) motions to dismiss based on the two-year statute of limitations. *In re Section 16(b) Litig.*, 602 F. Supp. 2d 1202, 1211-18 (W.D. Wash. 2009). The court did not address the Underwriters' remaining arguments regarding the merits of Simmonds's allegations and the scope of the Underwriters' exemptions from Section 16(b). *See id.* at 1205, 1219. The court dismissed without prejudice the thirty actions resolved by the Moving Issuers' Fed. R. Civ. P. 12(b)(1) motions. *Id.* at 1218. The court dismissed the remaining twenty-

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[5] The Moving Issuers—all of which are Delaware corporations—are Akamai Technologies, Inc.; Ariba, Inc.; AsiaInfo Holdings, Inc.; Aspect Medical Systems, Inc.; Audible, Inc.; Avici Systems, Inc. (now named Soapstone Networks, Inc.); Capstone Turbine Corporation; Cosine Communications, Inc.; Finisar Corporation; Internap Networks Service Corporation; Intersil Corporation; Martha Stewart Living Omnimedia, Inc.; Maxygen, Inc.; NaviSite Inc.; Occam Networks, Inc.; Onvia, Inc.; Oplink Communication, Inc.; Packeteer Inc.; Perot Systems Corporation; Priceline.com, Inc.; RedHat, Inc.; Saba Software, Inc.; Selectica, Inc.; Silicon Laboratories, Inc.; Sonus Networks, Inc.; Sycamore Networks, Inc.; TheStreet.com, Inc.; TiVo, Inc.; and Vignette Corporation.

four cases with prejudice in light of its ruling on the statute of limitations. *Id.*

Simmonds filed a timely appeal, and the thirty Moving Issuers filed timely cross-appeals requesting that the district court's dismissals of their cases be entered with prejudice rather than without prejudice. We granted the parties' joint motion to consolidate the cases on appeal pursuant to Fed. R. App. P. 3(b)(2).

JURISDICTION AND STANDARD OF REVIEW

Ordinarily, "[a] dismissal of a complaint without prejudice is not a final order." *Martinez v. Gomez*, 137 F.3d 1124, 1125 (9th Cir. 1998). However, the district court's orders in these cases are final and appealable because "leave to amend was not specifically allowed and [Simmonds] cannot amend [her] complaint to defeat the statute of limitations bar" as construed by the district court. *Id.* at 1125-26. Accordingly, we have jurisdiction pursuant to 28 U.S.C. § 1291.

We review the district court's dismissal for failure to comply with the demand requirement for abuse of discretion. *Potter v. Hughes*, 546 F.3d 1051, 1056, 1058 (9th Cir. 2008).[6] We review the district court's

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[6] The Moving Issuers challenged Simmonds's compliance with the demand requirement in a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). The demand requirement is an element of prudential statutory standing rather than constitutional Article III standing. *Potter*, 546 F.3d at 1055-56. While Article III standing may be raised in a Fed. R. Civ. P. 12(b)(1) motion, questions of statutory standing must be raised in a Fed. R. Civ. P. 12(b)(6) motion. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174-75 (9th Cir. 2004). We construe the Moving

dismissal on statute of limitations grounds de novo. *Lukovsky v. City & Cnty. of S.F.*, 535 F.3d 1044, 1047 (9th Cir. 2008). We refrain from reviewing issues not addressed by the district court. *Golden Gate Hotel Ass'n v. City & Cnty. of S.F.*, 18 F.3d 1482, 1487 (9th Cir. 1994) ("As a general rule, a federal appellate court does not consider an issue not passed upon below." (internal quotation marks omitted)).

DISCUSSION

[1] "Congress enacted Section 16(b) as part of the Exchange Act to prevent corporate insiders from exploiting their access to information not generally available to others." *Dreiling v. Am. Online Inc.*, 578 F.3d 995, 1001 (9th Cir. 2009) (internal quotation marks and alterations omitted). Section 16(b) requires corporate insiders to disgorge any trading profits they obtain in any "short-swing" transaction, which is defined as "a coupled purchase-and-sale, or sale-and purchase, completed within six months." *Dreiling v. Am. Express Co.*, 458 F.3d 942, 947 (9th Cir. 2006) (citing 15 U.S.C. § 78p(b)). There are four basic elements of a Section 16(b) claim: "(1) a purchase and (2) a sale of securities (3) by an officer or director of the issuer or by a shareholder who owns more than ten percent of any one class of the issuer's securities (4) within a six-month period." *Gwozdzinsky v. Zell/Chilmark Fund, L.P.*, 156 F.3d 305, 308 (2d Cir. 1998).

Issuers' Fed. R. Civ. P. 12(b)(1) motion as a Fed. R. Civ. P. 12(b)(6) motion. *See, e.g., Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206 n.2 (9th Cir. 1995).

The purpose of the rule is not to punish specific instances of wrongdoing or remedy harms suffered by particular individuals. Rather, the law is "aimed at protecting the public" by preventing corporate insiders from exploiting inside information at the expense of ordinary investors. *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 592 (1973). In order to fulfill this purpose, Section 16(b) "is a blunt instrument, at once both over- and under-inclusive." *Dreiling v. Am. Express*, 458 F.3d at 947. It "is over-inclusive in that it imposes strict liability regardless of motive, including trades not actually based on inside information," and "[i]t is under-inclusive in that there is no liability for trades made on inside information if more than six months transpire between purchase and sale." *Id.*

This appeal focuses on a pair of procedural prerequisites to filing a Section 16(b) lawsuit: the demand requirement, and the statute of limitations. Shareholders may only file a Section 16(b) suit after requesting that the issuing company take appropriate action against its insiders. If sixty days pass after a shareholder demand has been made without the issuing company resolving the matter (either informally or via lawsuit), shareholders may file suit on the issuing company's behalf. However, shareholders must file their suit within two years of the transactions at issue, subject to the tolling rules described in greater detail *infra*.

A. Demand Requirement

[2] Section 16(b) provides in relevant part that all insider short-swing trading profits "shall inure to and be recoverable by the issuer," and "[s]uit to recover

such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter . . . ." 15 U.S.C. § 78p(b). The issuing company's right to recover the insider's trading profits "is simply an application of an old principle in the law that if you are an agent and you profit by insider information concerning the affairs of your principal, your profits go to your principal." *Stock Exchange Regulation: Hearing Before the H. Comm. on Interstate and Foreign Commerce*, 73d Cong. 133 (1934) (statement of Thomas Corcoran, Counsel, Reconstruction Fin. Corp.).[7]

[3] Section 16(b) does not set forth any additional details regarding the nature and scope of this statutory demand requirement. In light of this Congressional silence, we turn to state law for

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[7] Certain courts and commentators have suggested that Section 16(b) actions are not true derivative actions. *E.g.*, *Dottenheim v. Murchison*, 227 F.2d 737, 738 (5th Cir. 1956); *Schaffer v. CC Investments, LDC*, 286 F. Supp. 2d 279, 281-82 (S.D.N.Y. 2003); 4 Hazen, *supra*, § 13.2 n.41; Peter J. Romeo & Alan L. Dye, *Section 16 Treatise and Reporting Guide*, § 9:03[1][a] (3d ed. 2008) (hereinafter Romeo & Dye.) We refrain from examining this question more closely because it is not relevant to the issues at hand. We note that derivative and quasi-derivative actions are generally governed by the procedural requirements of Fed. R. Civ. P. 23.1. *See Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 533-34 (1984). However, two of our sister circuits have suggested that Rule 23.1 does not apply in Section 16(b) actions. *Portnoy v. Kawecki Berylco Indus., Inc.*, 607 F.2d 765, 767 n.3 (7th Cir. 1979); *Dottenheim*, 227 F.2d at 738. We refrain from deciding this question because it is not relevant to our analysis.

guidance. The Supreme Court has explained that "where a gap in the federal securities laws must be bridged by a rule that bears on the allocation of governing powers within the corporation, federal courts should incorporate state law into federal common law unless the particular state law in question is inconsistent with the policies underlying the federal statute." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 108 (1991). Applying this broad principle in the context of the Investment Company Act of 1940, the *Kamen* Court held that "the contours of the demand requirement" (in that case, the standards governing demand futility) must be determined by the law of the state of incorporation. *Id.* at 101.

[4] Here, the adequacy of Simmonds's Section 16(b) demand letters is disputed in the thirty cases involving the Moving Issuers, all of which are Delaware corporations.[8] In light of the principles articulated in *Kamen*, these thirty demand letters must be analyzed in accordance with Delaware law, unless there is a conflict between Delaware law and federal law that "would frustrate specific objectives" of Section 16 and

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[8] Our analysis of Simmonds's demand letters is limited to the thirty cases in which the Moving Issuers contested the adequacy of Simmonds's demand. Although we have no reason to doubt Simmonds's assertion that she submitted "similar demands" to the twenty-four issuing companies that did not join the Motion to Dismiss, these letters are not currently part of the record and must be examined by the district court in the first instance. Accordingly, our analysis does not involve the twenty cases involving Delaware issuers who did not join the Moving Issuers' Motion to Dismiss, the two cases involving California issuers (Critical Path, Inc., and Openwave Systems, Inc.), or the cases involving a Washington issuer (Airspan Networks, Inc.) and a Bermuda issuer (Marvell Technology Group, Ltd.).

the Exchange Act. *Kamen*, 500 U.S. at 98 (citation, internal quotation marks, and alterations omitted). Our task under *Kamen* is the same as in any case decided under state law after *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). We must "'approximate state law as closely as possible in order to make sure that the vindication of the state right is without discrimination because of the federal forum.'" *Orkin v. Taylor*, 487 F.3d 734, 741 (9th Cir. 2007) (quoting *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 939 (9th Cir. 2001)). Accordingly, we must follow the Delaware Supreme Court's pronouncements, or, if the Delaware Supreme Court has not addressed the question, "we must predict how the Court will decide the issue, based on decisions of Delaware courts, decisions from other jurisdictions, treatises and restatements." *Matsuura v. Alston & Bird*, 166 F.3d 1006, 1008 n.3 (9th Cir. 1999) (per curiam). In other contexts, we have relied on the Delaware Court of Chancery's decisions as accurate statements of Delaware law, *id.* at 1008, and we note that there are particularly compelling reasons for following the Delaware Court of Chancery's decisions because it is widely recognized as the nation's leading authority on corporate law issues, *see, e.g.*, William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 Bus. Law. 351 (1992).

The Delaware Supreme Court has explained that the demand requirement exists "first to insure that a stockholder exhausts his intracorporate remedies, and then to provide a safeguard against strike suits." *Aronson v. Lewis*, 473 A.2d 805, 811-12 (Del. 1984), *overruled en banc on other grounds by Brehm v. Eisner*, 746 A.2d 244, 253 & n.13 (Del. 2000). "The

purpose of pre-suit demand is to assure that the stockholder affords the corporation the opportunity to address an alleged wrong without litigation, to decide whether to invest the resources of the corporation in litigation, and to control any litigation which does occur." *Spiegel v. Buntrock*, 571 A.2d 767, 773 (Del. 1990).[9] These justifications are not unique to Delaware. The Supreme Court has repeatedly highlighted these points, *Kamen*, 500 U.S. at 101; *Daily Income Fund*, 464 U.S. at 533, as have our sister circuits,[10] and leading commentators have approved.[11]

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[9] Another justification for the demand requirement is that the demand allows the corporation to exercise its business judgment and decide not to pursue the claim. *See Aronson*, 473 A.2d at 812 (noting that business judgment rule permits "independent disinterested directors to dismiss the action as inimical to the corporation's best interests"). This justification is inapplicable in Section 16(b) litigation because "[a]ny stockholder has a right to institute suit if the corporation fails to do so, regardless of the good faith or reasonable business judgment of the board of directors." *Pellegrino v. Nesbit*, 203 F.2d 463, 467 (9th Cir. 1953).

[10] *E.g.*, *Grossman v. Johnson*, 674 F.2d 115, 125 (1st Cir. 1982); *Lewis v. Graves*, 701 F.2d 245, 247-48 (2d Cir. 1983); *Shaev v. Saper*, 320 F.3d 373, 377 (3d Cir. 2003); *Hoffman v. Kramer*, 362 F.3d 308, 317 n.4 (5th Cir. 2004); *In re Ferro Corp. Derivative Litig.*, 511 F.3d 611, 618 (6th Cir. 2008); *Boland v. Engle*, 113 F.3d 706, 712 (7th Cir. 1997); *Allright Missouri, Inc. v. Billeter*, 829 F.2d 631, 638 (8th Cir. 1987); *Stepak v. Addison*, 20 F.3d 398, 402 (11th Cir. 1994); *Gaubert v. Fed. Home Loan Bank Bd.*, 863 F.2d 59, 65 (D.C. Cir. 1988).

[11] 13 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 5963 (Supp. 2010); American Law Institute, *Principles of Corporate Governance* § 7:03 cmt. c. (1992 & Supp. 2010); Daniel R. Fischel, Comment, *The Demand and Standing Requirements in Stockholder Derivative Actions*, 44 U. Chi. L. Rev. 168, 171-72 (1976).

As we have previously stated, the demand rule "is not merely a technical or unimportant requirement." *Potter*, 546 F.3d at 1058. Rather, it flows from "the general rule of American law . . . that the board of directors controls a corporation." *Id.* Indeed, the policies animating shareholder demands are particularly relevant in the Section 16(b) context. "Anecdotal evidence suggests that well over 90 percent of all Section 16(b) claims are settled privately, without any lawsuit being filed." Romeo & Dye, *supra*, § 9.01[7][c] (footnote omitted). This figure would almost certainty be lower if Section 16(b) did not contain a demand requirement, as shareholder demands allow boards to investigate the allegations and resolve matters without resorting to costly and burdensome litigation.

[5] To give effect to these general policies, the Delaware Chancery has required that demand letters "specifically state: (i) the identity of the alleged wrongdoers, (ii) the wrongdoing they allegedly perpetrated and the resultant injury to the corporation, and (iii) the legal action the shareholder wants the board to take on the corporation's behalf." *Yaw v. Talley*, Civ. A. No. 12882, 1994 WL 89019, at *7 (Del. Ch. Mar. 2, 1994) (unpublished opinion), *reprinted in* 20 Del. J. Corp. L. 454.[12] Furthermore, "the party asserting that a demand was made . . . bear[s] the burden of proof . . . ." *Id.* These requirements flow directly from the underlying justifications for the demand requirement: "[i]t is

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[12] Delaware rules of court allow citation to unpublished chancery decisions. 1 David A. Drexler, et al., *Delaware Corporation Law and Practice* § 2.05 (2009).

essential that the communication contain these three elements to enable the board to perform its duty to make a good faith investigation of claims of alleged wrongdoing, and, where appropriate, to rectify the misconduct." *Id.* We believe that this is a correct statement of Delaware law as it would be decided by the Delaware Supreme Court. This standard was announced by a vice chancellor who was later elevated to the state supreme court, *see Gatz v. Ponsoldt*, No. Civ. A. 174-N, 2004 WL 3029868, at *5 (Del. Ch. Nov. 5, 2004) (unpublished opinion), and, more importantly, this standard has been uniformly followed in subsequent Chancery decisions.[13] Accordingly, under *Kamen* and our general *Erie* jurisprudence, we apply this legal standard (and the Delaware courts' applications of it) except where it "frustrate[s] specific objectives" of Simmonds's federal cause of action. *See Kamen*, 500 U.S. at 98.[14]

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[13] *FLI Deep Marine LLC v. McKim*, No. Civ. A. 4138-VCN, 2009 WL 1204363, at *1 n.6 (Del. Ch. Apr. 21, 2009) (unpublished opinion); *Khanna v. McMinn*, No. Civ. A. 20545-NC, 2006 WL 1388744, at *13 (Del. Ch. May 9, 2006) (unpublished opinion); *Gatz*, 2004 WL 3029868, at *5.

[14] The federal district court in Delaware has articulated a similar standard regarding the demand requirement: "At a minimum, a demand must identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused to the corporation, and request remedial relief. In most instances, the shareholder need not specify his legal theory, every fact in support of that theory, or the precise quantum of damages." *Allison v. Gen. Motors Corp.*, 604 F. Supp. 1106, 1117 (D. Del.), *aff'd mem.*, 782 F.2d 1026 (3d Cir. 1985). Many federal courts, including the district court in this case, have relied on *Allison* or its federal progeny when addressing the adequacy of a demand under Delaware law. *See, e.g.*, *Richelson v. Yost*, __ F. Supp. 2d __, No. 10-1342, 2010 WL 3563108, at *8 (E.D. Pa. Sept. 9, 2010); *Dreiling*

Here, the thirty demand letters at issue in the Moving Issuers' motion (all of which were identical in all material respects) stated the following pertinent facts.[15] "[T]he Company's IPO underwriters, in addition to certain of its officers, directors and principal shareholders, as identified in the IPO prospectus . . . coordinated their efforts for the purpose of acquiring, holding, and/or disposing of securities of the Company," obtained beneficial ownership of shares amounting to more than 10% of the company's outstanding common stock in the year following the IPO, "engaged in purchases and sales of Company within periods of less than six months during" that year, and failed to report those transactions as required by Section 16(a). Simmonds "demand[ed] that the board of directors prosecute a claim against" those persons "for violations of § 16(b) of the Securities Exchange Act of 1934," in order to "compel[ ] [them] to disgorge the profits they made through purchases and sales of Company stock."

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v. Am. Express Co., 351 F. Supp. 2d 1077, 1085 (W.D. Wash. 2004), *rev'd on other grounds*, 458 F.3d 942 (9th Cir. 2006); *Levner v. Saud*, 903 F. Supp. 452, 456 (S.D.N.Y. 1994), *aff'd sub nom. Levner v. Prince Alwaleed*, 61 F.3d 8, 9 (2d Cir. 1995); *Rubin v. Posner*, 701 F. Supp. 1041, 1045 (D. Del. 1988). We believe, however, that the better approach is to rely on Delaware state courts to the greatest extent possible. Under *Kamen*, we give preference to the state courts' approach.

[15] The demand letters were identified in the Complaints, and the thirty letters sent to the Moving Issuers were submitted to the district court as part of their Motion to Dismiss. Because the parties did not dispute the authenticity of these documents, we may consider them without converting the motion to dismiss into a motion for summary judgment. *See Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

In response to twenty-five of the thirty Moving Issuers' requests for additional information, Simmonds explained that "the challenged transactions involved the activities of the lead underwriters, the other IPO underwriters, and the officers, directors and principal shareholders of the Company . . . related to improper IPO allocation (so-called 'laddering' and 'spinning') and research and stock rating activities during the Relevant Period. As you are aware, information regarding these activities is readily available at court, law firm and SEC websites."[16]

[6] Simmonds's initial demand letters satisfied the first part of the Delaware test for demand adequacy, which requires the shareholder to state "the identity of the alleged wrongdoers." *Yaw*, 1994 WL 89019, at *7. In *FLI Deep Marine v. McKim*, the plaintiff's demand

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[16] These follow-up letters were not mentioned in the Complaints or submitted by any of the Defendants in connection with the various motions to dismiss. Rather, they were submitted by Simmonds in opposition to the Moving Issuers' Motion to Dismiss. Ordinarily such extrinsic evidence may not be considered at this stage of the litigation. *See Knievel*, 393 F.3d at 1076. The district court determined, however, that these documents could be considered as part of the defendants' challenge to subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). *See In re Section 16(b) Litig.*, 602 F. Supp. 2d 1202, 1210 (W.D. Wash. 2009) ("A jurisdictional challenge under [Rule 12(b)(1)] may be made on the face of the pleadings or by presenting extrinsic evidence." (citing *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003)). Because we are proceeding under Fed. R. Civ. P. 12(b)(6) rather than Fed. R. Civ. P. 12(b)(1), we do not have the benefit of going beyond the pleadings as the district court did. However, we may consider Simmonds's follow-up letters to support our conclusion that Simmonds's thirty Complaints involving the Moving Issuers must be dismissed with prejudice. *See Broam v. Bogan*, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003).

letter stated that " 'certain employees, officers and directors of [the company] and others' " had diverted and misappropriated the company's assets. *FLI Deep Marine*, 2009 WL 1204363, at *1 (quoting demand letter). The Court of Chancery stated that this letter was sufficient to satisfy the first prong of *Yaw*. *Id.* at *1 n.6. Simmonds's demand letters identify the alleged wrongdoers with a similar level of precision as in the *FLI Deep Marine* plaintiff's demand letter. Specifically, Simmonds's letters identified "the Company's IPO underwriters, in addition to certain of its officers, directors and principal shareholders, as identified in the IPO prospectus." Although the Moving Issuers contend that their respective prospectuses listed between eleven and fifty-one underwriters, officers, and directors, and we acknowledge that this is a close question, we follow the Court of Chancery's approach in *FLI Deep Marine*.[17] Because Simmonds's demand letters identified a closed set of alleged wrongdoers, we agree with the district court that "the demand letters in this case sufficiently identify the alleged wrongdoers." *In re Section 16(b) Litig.*, 602 F. Supp. 2d at 1212.

[7] Simmonds's letters failed, however, to satisfy the second and third prongs of the Delaware test for demand adequacy, which require the shareholder to identify the "wrongdoing . . . allegedly perpetrated" and "the legal action the shareholder wants the board to take on the corporation's behalf." *Yaw*, 1994 WL

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[17] The Court of Chancery's approach is in tension with the Third Circuit's holding in *Shlensky v. Dorsey*, 574 F.2d 131, 140-41 (3d Cir. 1978), in which the court held that demand letters were inadequate where they alleged that the "responsible individuals" should be held accountable.

89019, at *7.[18] Simply put, Simmonds's demand letters presented factual theories that vary significantly from the facts alleged in the Complaints. Her demand letters claimed that the Underwriters directly bought and sold the Issuing Companies' shares, and accordingly requested that the Issuing Companies seek disgorgement of the Underwriters' trading profits. In contrast, her Complaints do not allege that the Underwriters directly participated in buying and selling the Issuing Companies' stock, and instead seek disgorgement of the profits the Underwriters received through their investment banking operations.[19]

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[18] Although the Delaware courts require the demand to describe "the resultant injury to the corporation," *Yaw*, 1994 WL 89019, at *7, this requirement "frustrate[s] specific objectives" of Section 16(b) by adding an additional element to the Section 16(b) cause of action. *See Kamen*, 500 U.S. at 98. Section 16(b) exists to remedy harms suffered by the general investing public, not harms suffered by issuing corporations. *See Kern County*, 411 U.S. at 591-92; *Champion Home Builders Co. v. Jeffress*, 490 F.2d 611, 619 (6th Cir. 1974) ("the absence of corporate damage is not a factor in assessing § 16(b) liability"). Accordingly, a shareholder's demand letter need not identify any corporate injury in order to satisfy the demand requirement of Section 16(b).

[19] In *Simmonds v. Morgan Stanley & Co., Inc.*, No. 09-35352, Simmonds alleges that Morgan Stanley and J.P. Morgan (the successor-in-interest to Hambrecht & Quist LLC) respectively sold $46.5 million and $34.6 million in shares of Internap Network Services Corporation as part of a secondary offering. Although Simmonds identified these transactions in her Complaint, she failed to allege that these transactions violated Section 16(b) and she failed to seek disgorgement of any profits obtained from these transactions. Accordingly, her demand letter to Internap Network Services Corporation (which is one of the Moving Issuers), was defective for the same reasons as in the other cases.

[8] According to the Complaints, the Underwriters violated Section 16(b) when they profited *indirectly* through their *customers'* purchases and sales of the Issuing Companies' shares. Specifically, the Complaints allege that the Underwriters engaged in "Short-Swing Transactions" when (1) their existing customers purchased and sold the issuing company's stock, (2) they obtained new banking customers in exchange for giving other companies' insiders favorable consideration in the issuing company's IPO, and (3) they obtained additional banking business from the issuing company in exchange for helping the issuing company's insiders profit from their own company's IPO. The Complaints assert that these "Short-Swing Transactions" violated Section 16(b), and request disgorgement of profits obtained through these "Short-Swing Transactions." None of these alleged transactions is referenced in any way in the original demand letters submitted to the Moving Issuers. The garden-variety Section 16(b) claim made out in these demand letters bears no resemblance to the elaborate scheme described in Simmonds's Complaints.

[9] Even if we consider Simmonds's follow-up letters to twenty-five of the Moving Issuers, she failed to identify the wrongful acts "clearly and specifically." *Yaw*, 1994 WL 89019, at *8. The follow-up letters noted that the "challenged transactions . . . [are] related to improper IPO allocation (so-called 'laddering' and 'spinning') and research and stock rating activities." Simmonds's conclusory references to "laddering," "spinning," and "research and stock rating," were vague and ambiguous, as was her open ended reference to "court, law firm and SEC websites," and completely failed to provide sufficiently detailed

information to permit the boards to conduct a good faith inquiry into the alleged wrongdoing.

[10] Moreover, because the demand letters and the Complaints contain distinct factual assertions, the demand letters also failed to set forth "the legal action the shareholder wants the board to take on the corporation's behalf." *Yaw*, 1994 WL 89019, at *7. The demand letters requested that the Moving Issuers "compel[ ]" the Underwriters and other group members to "disgorge the profits they made through purchases and sales of [the issuing company's] stock." The Complaints, on the other hand, do not mention the Underwriters' direct trading profits, and instead seek disgorgement of the profits the Underwriters received through their investment banking operations.

[11] The Court of Chancery has noted that demand letters must be sufficiently specific to "enable the board to perform its duty to make a good faith investigation of claims of alleged wrongdoing[ ] and . . . to rectify the misconduct" at issue in a subsequent lawsuit. *Yaw*, 1994 WL 89019, at *7. The court further noted that "to require a board to investigate claims asserted ambiguously . . . would not be an efficient use of corporate resources, because the board would lack the information necessary to make a good faith inquiry." *Id.* Simmonds's demand letters were particularly inadequate because they described a different course of conduct than the one she described in her Complaints. And clearly, Simmonds's demand letters could have led directors to investigate facts (the Underwriters' purchases and sales of Issuing Company stock) that were only marginally related to the issues ultimately raised in the Complaints (the Underwriters' *customers'* purchases and sales of Issuing Company

stock, and associated profit-sharing agreements between the Underwriters and their customers).

We are not persuaded by Simmonds's argument that the Moving Issuers subjectively understood what she meant in her demand letters. Delaware case law sets forth an objective standard for assessing the adequacy of a demand and does not inquire whether the board of directors had independent knowledge of relevant information. To the extent that Simmonds's argument has been addressed by any courts, it has been soundly rejected. For example, the Third Circuit has rejected a shareholder's argument that a conclusory demand was adequate because "the directors were in a better position than the shareholders to make the investigation necessary to uncover wrongdoers." *Shlensky*, 574 F.2d at 141. In the related context of demand refusal, the Delaware Supreme Court rejected the argument that "[t]he board has better access to the relevant facts" and plaintiffs should therefore be relieved of their burden to show that the board's refusal was improper. *Levine v. Smith*, 591 A.2d 194, 209 (Del. 1991) (internal quotation marks omitted), overruled en banc on other grounds by *Brehm*, 746 A.2d at 253 & n.13.

Simmonds's argument is an end-run around Delaware's requirement that shareholders make reasonably specific demands, and were we to adopt Simmonds's proposed approach, Delaware's demand standard would be eviscerated. Plaintiffs in derivative actions often seek relief for a corporate insider's wrongdoing. If the demand requirements were relaxed on account of insiders' subjective knowledge, then shareholders would *never* have to "clearly and specifically" describe their assertions in a demand

letter. *See Yaw*, 1994 WL 89019, at *8. To the extent that Simmonds believed that relevant information was "readily available at court, law firm and SEC websites" as she claimed in her follow-up letters, it was her burden under Delaware law to distill the relevant facts and present them to the board. Delaware law does not allow shareholders to forego pre-suit investigations in an attempt to shift information-gathering costs onto the corporation, and this rule is not clearly incompatible with Section 16 and the Exchange Act.

As an alternative to her argument that her demand letters were adequate, Simmonds contends that the demand requirement should be excused as futile. However, Delaware courts have repeatedly held that a shareholder concedes that a demand is not futile by submitting a demand to the board. "Delaware law could hardly be clearer" in holding that shareholders may not invoke the futility exception after submitting a demand to the board. *FLI Deep Marine*, 2009 WL 1204363, at *3; *see also id.* at *3 n.17 (collecting cases).

[12] We hold that the thirty demand letters in the record fail to satisfy the demand requirement under Delaware law. Accordingly, we affirm the district court's order granting the Moving Issuers' motions to dismiss the thirty cases to which they are parties.

B. Statute of Limitations

[13] The district court dismissed the cases involving the remaining twenty-four issuers (that is, the Issuing Companies that did not join the Moving Issuers' Motion to Dismiss) on account of the statute of limitations. Section 16(b) provides that " no . . . suit shall be brought more than two years after the date

such profit was realized" from the alleged short-swing transactions. 15 U.S.C. § 78p(b). We have previously issued a thorough decision interpreting this provision, *Whittaker v. Whittaker Corp.*, 639 F.2d 516 (9th Cir. 1981), and we are bound by our prior holding.

In *Whittaker*, a corporate insider engaged in prohibited short-swing transactions between December 1965 and December 1970. The corporation sought disgorgement in January 1971 without filing a lawsuit. The insider paid the full amount requested, but later filed suit against the corporation seeking to recover some of the money he had paid. *Id.* at 518-19. In the lawsuit, he argued that Section 16(b)'s statute of limitations barred the corporation from retaining any amounts that he had obtained from short-swing transactions prior to January 1969 (that is, two years prior to the time that the corporation requested that he disgorge his profits). *Id.* at 519. The district court agreed with the insider, and "found that various corporate officers had information which put the Corporation on notice throughout the relevant trading period" between 1965 and 1970. *Id.* at 527. Based on this factual finding, the district court allowed the corporation to recover the insider's profits only for the two years prior to the disgorgement request. *Id.* at 519, 527; *see also Whittaker v. Whittaker Corp.*, No. 75-2546, 1977 WL 1006, at *9-10 (C.D. Cal. Mar. 22, 1977) (setting forth factual findings in greater detail).

On appeal, we explained that there were three competing approaches to Section 16(b)'s statute of limitations: (1) a "strict" approach under which the statute is treated as a statute of repose—that is, a firm bar that is not subject to tolling; (2) a "notice" or "discovery" approach like the one that had been

applied by the district court, "under which the time period is tolled until the Corporation had sufficient information to put it on notice of its potential § 16(b) claim"; and (3) a "disclosure" approach "under which the time period is tolled until the insider discloses the transactions at issue in his mandatory § 16(a) reports." *Whittaker*, 639 F.2d at 527. After thoroughly analyzing the merits of the competing interpretations, *id.* at 527-30, we held unequivocally that "the disclosure interpretation is the correct construction of § 16." *Id.* at 527. Under this approach, "an insider's failure to disclose covered transactions in the required § 16(a) reports tolls the two year limitations period for suits under § 16(b) to recover profits connected with such a non-disclosed transaction. The two-year period for § 16(b) begins to run when the transactions are disclosed in the insider's § 16(a) report." *Id.* at 530. Accordingly, we reversed the district court's use of the "notice" approach and held that the corporation could recover all of the insider's short-swing profits, even those obtained long after the corporation was on notice of the insider's trading. *Id.*

[14] In this case, the Defendants advance various arguments in an attempt to distinguish *Whittaker*. All of these arguments are variations on a single theme—Simmonds knew or should have known of the alleged wrongful conduct many years before she filed her Complaints. But despite the Defendants' arguments, the central holding of our opinion in *Whittaker*—both in our legal analysis and our application of the law to the facts of that case—is that the Section 16(b) statute of limitations is tolled until the insider discloses his transactions in a Section 16(a) filing, regardless of whether the plaintiff knew or should have known of the conduct at issue. We

recently restated this holding in *Roth v. Reyes*, 567 F.3d 1077 (9th Cir. 2009), in which we concluded that the statute of limitations begins to run when the insider files a Section 16(a) report *even if* the contents of the filing inaccurately claim an exemption that does not actually apply. *Id.* at 1083. We explained that the basic act of filing a Section 16(a) report satisfies *Whittaker*'s disclosure requirement and "supports the goals of disclosure and transparency" underlying Section 16. *Id.* at 1083.

The Defendants advance four specific points in support of their general theory that *Whittaker* can be distinguished. First, they argue that *Whittaker* does not apply because Simmonds knew or should have known of the relevant facts sometime around 2001. By that time, much of the information described in the Complaints had been publicly disclosed in court filings, news reports, and the Issuing Companies' IPO registration filings. The Defendants contend that "[w]hen a party is aware of the necessary facts to bring a claim, there is no excuse for any delay beyond the statute of limitations period, let alone a delay of six years." However, this theory was plainly rejected in *Whittaker*. Our *Whittaker* decision *reversed* the district court's conclusion that the statute of limitations began to run at the time that "various corporate officers had information which put the Corporation on notice" of the insider's short-swing trades. *Whittaker*, 639 F.2d at 527. The Defendants' "notice" argument is an unpersuasive attempt to revive a theory that we considered and rejected nearly thirty years ago.

Second, the Defendants argue that the Section 16(b) limitations period should not be tolled indefinitely unless the defendant actively "conceal[s]

the facts necessary to trigger a Section 16(b) lawsuit."[20] This theory overlooks the footnote in *Whittaker* in which we explained that "[t]he failure to disclose in § 16(a) reports, whether intentional or inadvertent, is deemed concealment, thus triggering the traditional equitable tolling doctrine of fraudulent concealment." *Id.* at 527 n.9. That conclusion was further bolstered by our emphasis on creating a rule that can be "mechanically calculated from objective facts," *id.* at 529, which would be undermined if courts were required to conduct case-specific inquiries into the insiders' state of mind about their failure to file Section 16(a) reports.

Third, the Defendants contend that *Whittaker* does not apply in this case because the Underwriters are exempt from Section 16(a) reporting requirements under the SEC's underwriting and market-making exemptions. However, this argument finds no support in *Whittaker*'s bright-line rule. *See Whittaker*, 639 F.2d at 527 & n.9, 530. In any event, were we to follow the Defendants down this line of argument, we would soon find ourselves deciding the substantive merits of the parties' dispute. The question of whether or not the Underwriters are exempt from filing Section 16(a) reports is identical to the question of whether they may be held liable under Section 16(b). We refrain from adopting an approach that "would merge the tolling doctrine with the substantive wrong . . . ."

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[20] This approach was advocated by Judge Jacobs of the Second Circuit in *Litzler v. CC Investments, L.D.C.*, 362 F.3d 203, 208 n.5 (2d Cir. 2004) (Jacobs, J., concurring) ("The author of this opinion . . . would have preferred to say that the statute of limitations in Section 16(b) is equitably tolled only when the failure to file is intentional or unreasonable.").

Santa Maria v. Pac. Bell, 202 F.3d 1170, 1177 (9th Cir. 2000).

Finally, the Defendants argue that *Whittaker* does not apply because it involved a *corporation* that was seeking disgorgement, rather than an *outside shareholder* as in the instant case. They assert that we should adopt different lines of analysis depending on whether the plaintiff is an issuing company or is an outside shareholder such as Simmonds. However, our decision in *Whittaker* created a blanket rule that applies in *all* Section 16(b) actions. A key component of our reasoning was that Section 16(a) notices allow the company's shareholders—who "are likely to be outsiders, minority holders"—to obtain the information necessary to bring a Section 16(b) action. *Whittaker*, 639 F.2d at 528. Nothing in *Whittaker*'s logic or reasoning would allow us to distinguish between issuing companies and outside shareholders, and we refrain from adopting such a strained interpretation of our precedent.

[15] In short, the fundamental holding of *Whittaker* is that Section 16(b)'s two-year statute of limitations begins to run from the time that the defendant files a Section 16(a) disclosure statement. Because Simmonds alleges that the Defendants did not file any Section 16(a) reports, we conclude that Simmonds's claims are not time-barred. Accordingly, the district court's decision on this ground is reversed.

C. Cross-Appeal

In their cross-appeal, the Underwriters contend that the district court erred by dismissing the thirty cases involving the Moving Issuers without prejudice

on account of Simmonds's inadequate demand. They argue that these dismissals should have been with prejudice because Simmonds's claims are time-barred. Although we disagree that Simmonds's claims are time-barred, we agree that the district court should have dismissed the thirty Complaints against the Moving Issuers with prejudice on account of her failure to satisfy the Section 16(b) demand requirement in those cases.

[16] We have previously held that a complaint may be dismissed with prejudice on account of the plaintiff's failure to satisfy the demand requirement, *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 990-91 (9th Cir. 1999), *abrogated on other grounds*, *Tellabs, Inc. v. Makor Issues & Rights*, 551 U.S. 308, 322-24 (2007), and various other circuits have reached the same conclusion.[21] Although the district court dismissed Simmonds's thirty Complaints against the Moving Issuers "without prejudice," our decision to convert the dismissal is not unprecedented. In a derivative action in which the shareholder failed to show demand futility, the First Circuit *sua sponte* converted the district court's dismissal from "without prejudice" to "with prejudice." *In re Kauffman Mut. Fund Actions*, 479 F.2d 257, 267 (1st Cir. 1973). The

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[21] *E.g.*, *Kanter v. Barella*, 489 F.3d 170, 175 (3d Cir. 2007) (dismissal with prejudice and without leave to amend); *Starrels v. First Nat'l Bank of Chicago*, 870 F.2d 1168, 1169, 1172 (7th Cir. 1989) (dismissal with prejudice and without leave to amend); *Gaubert v. Fed. Home Loan Bank Bd.*, 863 F.2d 59, 62, 69 (D.C. Cir. 1988) (dismissal with prejudice and without leave to amend); *Shlensky*, 574 F.2d at 141-42 (dismissal without leave to amend); *In re Kauffman Mut. Fund Actions*, 479 F.2d 257, 267 (1st Cir. 1973) (dismissal with prejudice).

court explained that the plaintiff was barred from relitigating the issues decided in that action, and accordingly the dismissal should have been entered with prejudice rather than without. *Id.*

[17] We agree with the First Circuit's approach in *Kauffman*. Simmonds is barred from relitigating issues relating to the adequacy of the demand letters she sent to the thirty Moving Issuers and the follow-up letters she sent to twenty-five of the Moving Issuers. As with any issue litigated fully on merits, shareholders may not endlessly relitigate the adequacy of their pre-suit demand. Accordingly, we vacate the district court's order dismissing without prejudice the thirty cases involving the Moving Issuers, and the district court is instructed to dismiss these thirty cases with prejudice.

[18] In the twenty-four cases that were improperly dismissed as time-barred and in which the Issuing Companies did not join the Moving Issuers' Motion to Dismiss, the district court is directed to permit the Underwriters and Issuing Companies to seek dismissal on account of Simmonds's failure to comply with the demand requirement.[22] We note that our

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[22] Contrary to the district court's suggestion, *see In re Section 16(b) Litig.*, 602 F. Supp. 2d at 1211, the Underwriters should be permitted to file motions challenging Simmonds's compliance with the demand requirement. *See Shlensky v. Dorsey*, 574 F.2d 131, 142 (3d Cir. 1978) ("it is well settled . . . that defendants other than the corporation whose rights the shareholder plaintiffs are seeking to vindicate may successfully raise the defense of failure to comply with Rule 23.1" and the demand requirement); *accord Hawes v. City of Oakland*, 104 U.S. 451, 461-62 (1881) (complaint dismissed on motion by third party defendant); *Brody v. Chem.*

discussion in this opinion will almost certainly resolve

Bank, 517 F.2d 932, 933 (2d Cir. 1975) (per curiam) (complaint dismissed sua sponte).

The Delaware Supreme Court has thoroughly and persuasively explained why third parties have standing to raise defenses based on the shareholder's failure to comply with demand requirement. *Kaplan v. Peat, Marwick, Mitchell & Co.*, 540 A.2d 726, 730 (Del. 1988). "The standing of a third party to assert demand related defenses must be determined, not on the basis of whether such status benefits the interests of the third party, but whether according such status furthers the nature and purpose of the demand requirement." *Id.* The court explained (as we discussed *supra*) that "[t]he purpose of pre-suit demand is to assure that the stockholder affords the corporation the opportunity to address an alleged wrong without litigation and to control any litigation which does occur." *Id.* Accordingly, the court concluded that third party defendants may challenge the sufficiency of a shareholder's demand. *Id.*

We agree with the reasoning of the Delaware Supreme Court in *Kaplan*, and disagree with the district courts that have held that this result is at odds with the purposes of Section 16(b). *See In re Section 16(b) Litig.*, 602 F. Supp. 2d at 1211 (collecting cases). In light of our general discussion of the demand requirement, we conclude that the Section 16(b) demand requirement—like the demand requirement in all derivative actions— exists for the purpose of allowing corporations to investigate their insiders' wrongdoing, resolve disputes without resorting to litigation, and control any litigation that may take place. *See Kaplan*, 540 A.2d at 730. In addition, we note that the demand requirement of Section 16(b) is a *required* statutory precondition to a shareholder's lawsuit. *See* 15 U.S.C. § 78p(b). As the Delaware Supreme Court explained in *Kaplan*, third parties are permitted to raise demand-related defenses because a shareholder's "right to bring a derivative action does not come into existence until the plaintiff shareholder has made a demand on the corporation to institute such an action." *Id.* We see no reason why such reasoning does not apply in the Section 16(b) context.

Accordingly, in the twenty-four cases being remanded, the district court should follow the general rule under both Delaware law and federal law: any defendant in a Section 16(b) action may challenge the adequacy of the shareholder's pre-suit demand.

the twenty remaining cases involving issuers incorporated in Delaware. (We express no opinion regarding the four cases involving non-Delaware issuers.) However, as Simmonds' demands letters to those companies are not in the record, we leave it to the district court to address those cases in the first instance.[23] We note that four of the cases involve issuers incorporated in jurisdictions other than Delaware (two issuers are incorporated in California, one in Washington, and one in Bermuda). We direct the district court to analyze the adequacy of those demand letters in accordance with the choice-of-law principles articulated in *Kamen*—namely, the court should apply the demand requirements of California, Washington, and Bermuda law, unless those requirements "would frustrate specific objectives" of Section 16 and the Exchange Act. *Kamen*, 500 U.S. at

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[23] Because consolidated appeals "do not merge into one" for all purposes, Fed. R. App. P. 3 advisory committee's note (1998 amend.), the district court should be careful about invoking the "law of the case" doctrine in the remanded cases involving the twenty issuers incorporated in Delaware that did not join the Moving Issuers' Motion to Dismiss, *see generally*, Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Ligitation*, 135 U. Pa. L. Rev. 595, 623-25 (1987) (hereinafter Steinman); *cf. State HMO Management, Inc. v. Tingley Systems, Inc.*, 181 F.3d 174, 180 (1st Cir. 1999) (treating consolidated cases "as a single action for res judicata purposes"). However, if Simmonds's demand letters to those twenty Delaware-incorporated issuers are substantially similar to the thirty demand letters examined in this opinion, the district court is bound by *stare decisis* to apply our holding that demand letters such as the thirty letters we have examined are inadequate as a matter of Delaware law. *See* Steinman, *supra*, at 624-25.

98 (citation, internal quotation marks, and alterations omitted).

CONCLUSION

We **AFFIRM** the district court's conclusion that Simmonds's demand letters to the thirty Moving Issuers were inadequate under Delaware law, **REVERSE** the district court's conclusion that all of Simmonds's claims are time-barred, and **VACATE** the district court's dismissal orders as to the thirty Moving Issuers with instructions that the district court dismiss these thirty cases with prejudice on account of Simmonds's failure to satisfy Delaware's demand requirement. We **REMAND** the remaining twenty-four cases (that is, the cases involving the twenty-four Issuing Companies that did not join the Moving Issuers' Motion to Dismiss) with instructions for the district court to allow the Underwriters and Issuing Companies to file an appropriate motion to challenge the adequacy of Simmonds's demand letters under Delaware, California, Washington, and Bermuda law, unless that law conflicts with Section 16(b). Costs are awarded to the Appellees.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED IN PART.

M. SMITH, Circuit Judge, specially concurring:

The statutory text of Section 16(b) provides that "no such suit shall be brought more than two years after the date such profit was realized." 15 U.S.C. § 78p(b). In my view, "no suit" means no suit, and "two years

after the date such profit was realized" means two years after the insider's final profitable transaction, regardless of when—or even if—a Section 16(a) report is filed. The text of the statute sets a firm bar against Section 16(b) suits filed more than two years after the transaction is completed. Accordingly, I agree with the Supreme Court's *dictum* that Section 16(b) "sets a 2-year . . . period of repose." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 360 n.5 (1991).

This straightforward textual reading is further confirmed by comparing the language of Section 16(b) with the language of the other statutes of limitations in our securities laws. *See Lampf*, 501 U.S. at 360-61 & nn.5-7. The Court in *Lampf* explained that language such as Section 16(b)'s "no such suit shall be brought" creates periods of repose that are not subject to tolling. *Id.* at 360-61, 363. In addition, the general securities fraud statute of limitations added by the Sarbanes-Oxley Act of 2002, 116 Stat. 801, provides that securities fraud suits "may be brought not later than . . . 5 years after such violation." 28 U.S.C. § 1658(b)(2). The Supreme Court recently noted that this provision "giv[es] defendants *total repose* after five years." *Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784, 1797 (2010) (emphasis added). There is little meaningful distinction between the language of 28 U.S.C. § 1658(b)(2) and Section 16(b)—one provides that suits "may be brought not later than . . . 5 years after such violation," and the other provides that "no such suit shall be brought more than two years after the date such profit was realized." To me, this nearly identical language should "giv[e] defendants total repose" under both statutes. *See Merck*, 130 S. Ct. at 1797.

There are numerous reasons why Congress would elect to create a firm two-year period of repose for Section 16(b) actions. Although there is no direct evidence of Congress's intent, the legislative history has left behind an intriguing clue. When the Senate and House of Representatives passed their respective bills that later became the Exchange Act, the House of Representatives's verison did not even provide for a private right of action under Section 16(b), whereas the Senate's version provided a right of action but omitted a statute of limitations. Romeo & Dye, *supra*, § 1.02[3][b][vi]. It is reasonable to infer that the House negotiators, in reaching a compromise with the Senate over the inclusion of a private right of action, might have bargained to include a stringent statute of limitations to circumscribe that right of recovery.

Admittedly, the legislative history is inconclusive, but a restrictive statute of limitations is eminently logical. Section 16(b) imposes an inflexible penalty on corporate insiders even if they are not at fault and third parties are unharmed. As Section 16(b)'s critics have noted, its disgorgement provision "is little more than a trap for the unwary." *Id.* § 9.01[11][a]. It makes no sense to allow individuals to be hauled into court years—or even decades—after they unintentionally violate Section 16. Our holding in *Whittaker* creates the possibility that "a claim that affects long-settled transactions might hang forever over honest persons." *Litzler v. CC Investments, L.D.C.*, 362 F.3d 203, 208 n.5 (2d Cir. 2004) (Jacobs, J., concurring). *Whittaker* could lead to the anomalous situation in which a corporate officer who mistakenly calculates the six-month short-swing period can be compelled to disgorge his trading profits decades after the fact, whereas a culpable officer who engages in fraudulent insider

trading becomes immune from civil suit after five years as long as his trades were spaced more than six months apart. I fail to see the logic behind such a result, and I fear that *Whittaker* failed to foresee such anomalies.

I note that *Whittaker* was motivated by the well-intentioned concern that corporate insiders could avoid Section 16(b) liability if they flout Section 16(a)'s reporting requirements. However, I do not believe that this concern warrants the creation of never-ending liability for corporate directors, officers, and shareholders. The Exchange Act is a comprehensive statute that was designed to address various types of wrongdoing. It is inappropriate for us to use Section 16(b), which prohibits certain types of insider trading, to enforce the policies of Section 16(a), which requires disclosure of insider trading. The Exchange Act creates more than adequate enforcement mechanisms for enforcing Section 16(a)'s disclosure requirements. If the insiders do not file their reports, they may be held professionally, civilly, or criminally liable for failing to do so. *See, e.g.*, 15 U.S.C. § 78ff(a) (criminal penalties); *In re Gold*, Exchange Act Release No. 34-51585, 85 S.E.C. Docket 724 (Apr. 20, 2005) (professional and civil penalties). And if the insiders withhold their Section 16(a) reports in order to profit from inside information, they may be subjected to Rule 10b-5 securities fraud actions. *See, e.g.*, *In re Daou Sys., Inc.*, 411 F.3d 1006, 1022-24 (9th Cir. 2005).

Ultimately, I believe that *Whittaker*'s cure is worse than the disease it intended to address. I would have preferred to adopt any one of the three alternatives to *Whittaker*: the statute of repose approach, *Lampf*, 501 U.S. at 360 n.5, the actual notice approach, *Litzler*, 362

F.3d at 208, or the hybrid approach that tolls the statute in cases of "fraud or concealment," *id.* at 208 n.5 (Jacobs, J., concurring). Of these three approaches, the statutory text and statutory structure clearly point toward the repose approach. Were it not for *Whittaker*, I would hold that Section 16(b) suits may not be brought more than two years after the short-swing trades take place.

Despite these concerns, I am compelled to follow *Whittaker*. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc). Accordingly, I concur with the panel's decision.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MASTER CASE NO. C07-1549JLR

[Filed March 12, 2009]

IN RE: SECTION 16(B) LITIGATION)
)

ORDER DISMISSING CASES

I. INTRODUCTION

Before the court are 54 derivative shareholder actions brought by one shareholder, Plaintiff Vanessa Simmonds. The cases are based on the theory that Defendants engaged in insider trading during the late-1990s and early 2000 during which there was an increase in private companies going public. Ms. Simmonds sued the underwriters that were responsible for underwriting the Initial Public Offerings ("IPOs") for many of these companies (hereinafter the "Underwriter Defendants"), whose duties included setting an IPO price for the shares.[1]

[1] An IPO is a financing tool companies use to raise capital through equity rather than debt. An issuing company, also referred to as "the issuer," can earn equity capital by selling its shares to a large

Ms. Simmonds also names, as nominal defendants, the companies themselves (hereinafter the "Issuer Defendants"). She asserts a claim for violation of Section 16(b) of the Securities and Exchange Act of 1934 (the "Act") against each of the Underwriter Defendants. She contends that during the underwriting process the Underwriter Defendants made agreements with other insiders and certain investors in order to profit from under priced IPOs.

Before the court is a motion to dismiss pursuant to Rule 12(b)(1) filed by 30 of the 54 Issuer Defendants in C07-1549 (Dkt. # 56); an omnibus motion to dismiss filed by all of the Underwriter Defendants in C07-1549 (Dkt. # 57); and supplemental individual motions to dismiss filed by Issuer Defendant Intersil Corporation in C07-1572 (Dkt. # 47), Issuer Defendant Audible Inc. in C07-1623 (Dkt. # 33), and Issuer Defendant Packeteer Inc. in C07-1654 (Dkt. # 39).[2] The Issuer Defendants' motion to dismiss (Dkt. # 56) presents the threshold question whether Plaintiff Vanessa Simmonds has standing to bring these derivative claims because she failed to make an adequate demand on the Issuer Defendants before instituting these actions.[3] In the Underwriter Defendants'

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number of public investors. This process of raising capital is commonly referred to "going public" or an "initial public offering."

[2] Unless noted otherwise, all docket references are to the master docket found at *Simmonds v. Credit Suisse Sec., et al.*, C07-1549.

[3] It is unclear why only 30 of the 54 Issuer Defendants joined in the motion to dismiss. This may be the result of the remaining 24 Issuer Defendants believing that Ms. Simmonds has standing based on the information she provided to those Issuer Defendants.

omnibus motion, as well as part of the Issuer Defendants' motion, the Defendants ask the court to determine whether the statute of limitations for bringing these Section 16(b) claims has expired. The remaining supplemental motions seek dismissal of Ms. Simmonds' complaints against certain Issuer Defendants bringing motions for lack of standing based on separate sets of facts. For the reasons stated below, the court GRANTS in part and DENIES in part the motions as follows:

- The court GRANTS the motion to dismiss filed by 30 of the Issuer Defendants in C07-1549 (Dkt. # 56). The court dismisses the complaints in the following cause numbers without prejudice: C07- 1549; C07-1567, C07-1570, C07-1571, C07-1572, C07-1573, C07- 1576, C07-1584, C07-1587, C07-1588,C07-1589, C07-1590, C07- 1594, C07-1595, C07-1597, C07-1598, C07-1605, C07-1623, C07- 1624, C07-1629, C07-1631, C07-1633, C07-1637, C07-1652, C07-1653, C07-1654, C07-1655, C07-1666, C07-1667, C07-1669;

- The court GRANTS the omnibus motion to dismiss filed by the Underwriter Defendants in C07-1549 (Dkt. # 57) as to the remaining 24 cases: C07-1566, C07-1568, C07-1569, C07-1575, C07-1577, C07-1578, C07-1579,C07-1580, C07-1581, C07-1582,C07-1583, C07-1585, C07-1593, C07-1626, C07-1627, C07-1628, C07-1630,

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The court questioned Issuer Defendants' liaison counsel at oral argument on this issue but liaison counsel did not know why only 30 of the Issuer Defendants joined in the motion.

C07-1632, C07-1634, C07-1635, C07-1636, C07-1638, C07-1668, C07-1670. The court dismisses these complaints with prejudice;

- The court DENIES the omnibus motion to dismiss filed by the Underwriter Defendants in C07-1549 (Dkt. # 57) as to the Issuer Defendants seeking dismissal for lack of subject-matter jurisdiction in Dkt. No. 56 from above. These motions are MOOT in light of the court's ruling on the Issuer Defendants' motion to Dismiss (Dkt. # 56);

- The court DENIES the supplemental individual motion to dismiss filed by Issuer Defendant Intersil Corporation in C07-1572 (Dkt. # 47) as MOOT;

- The court DENIES the supplemental individual motion to dismiss filed by Issuer Defendant Audible Inc. in C07-1623 (Dkt. # 33) as MOOT; and

- The court DENIES the supplemental individual motion to dismiss filed by Issuer Defendant Packeteer Inc. in C07-1654 (Dkt. # 39) as MOOT.

II. BACKGROUND

This case involves Section 16(b) of the Act which prohibits short-swing stock transactions by insiders. It also involves IPOs that took place approximately 10 years ago. Section 16(b) establishes strict liability for insiders (i.e., officers, directors, or beneficial owners of more than ten percent of a companies stock) who

purchase and sell securities within a six-month period. An insider found liable under Section 16(b) must disgorge any profits made from any of these sales and purchases – referred to as "short swing profits." Section 16(b) also contains a demand requirement. The demand requirement sets forth the basis by which a shareholder may obtain standing to sue on behalf of the corporation. The shareholder is required to first demand that the corporation bring the lawsuit; if the corporation declines to bring suit, the shareholder may initiate a derivative suit on behalf of the corporation.

Between October 2 and October 12, 2007, Ms. Simmonds filed 55 separate complaints against the Defendants alleging violations of Section 16(b).[4] The cases were consolidated for pretrial purposes before this court (Dkt. # 2). Ms. Simmonds, a college student, brought the related derivative complaints in her capacity as a shareholder of the Issuer Defendants, all are companies that conducted initial public offerings ("IPOs") between late 1999 and early 2000. (*See, e.g.*, Onvia Compl. (Dkt. # 11) ¶ 9.) The complaints allege that certain investment banks, the Underwriter Defendants, violated Section 16(b)'s prohibition on short-swing transactions because they allegedly profited from aftermarket transactions executed by investors to whom they allocated IPO shares. (*See, e.g.*, *id.* at ¶ 23.) Each complaint is based on similar factual allegations and asserts only one cause of action for violation of Section 16(b).

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[4] One of the 55 cases originally filed, *Simmonds v. Covad*, CV07-1625 was voluntarily dismissed on April 25, 2008 (Dkt. # 18).

The alleged factual basis for each of Ms. Simmonds' complaints is that the Underwriter Defendants colluded with insiders of the Issuer Defendants and certain investors in order to personally profit from underpriced IPOs. (Resp. (Dkt. # 58) at 2 ("The Underwriters' insider status is based upon a recurring pattern of coordinating with key insiders.")) These same allegations appeared in an earlier consolidated case involving these Underwriter Defendants and almost all of the Issuer Defendants, *see In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 293-94 (S.D.N.Y. 2003) ("*In re IPO*") (alleging fraud pursuant to Rule 10b-5 of the Securities Exchange Act of 1934), and in a number of other lawsuits around the country based on other theories of liability arising out of the same or similar allegations. In the *In re IPO* master complaint, the investor plaintiffs allege that the Underwriter Defendants, investment banks entrusted with valuing and underwriting IPOs, orchestrated a vast scheme to defraud the investing public during the late 1990s IPO boom. *Id.* The alleged scheme took place between January 1998 and December 2000 and involved the IPOs of approximately 300 high technology and Internet-related companies. *Id.* The *In re IPO* plaintiffs filed over 1,000 complaints against the Underwriter Defendants and other insiders in 2001, which were later consolidated in *In re IPO*. *Id.*

The *In re IPO* plaintiffs alleged a fraudulent scheme both far reaching and complex in scope. Even the alleged damage resulting from the scheme is difficult to quantify and involves unwritten understandings relating to profit-sharing between the investment banks and their customers. The crux of the plaintiffs' theory in that case is that the investment banks responsible for underwriting the 1998-2000

IPOs at issue required their investing customers to agree to purchase additional shares of a company's stock in the aftermarket in order to receive shares in the company's IPO. *Id.* at 294. The opportunity to purchase IPO stock was important to the banks' customers because, as alleged by plaintiffs, the average first day gain on an IPO stock was just over 60% for all IPOs during the 1998-2000 period and almost 140% for the specific IPOs at issue in *In re IPO*. *Id.* at 294 n.2. The *In re IPO* plaintiffs also allege that some of the investment banks required that their customers pay them a portion of the profits they made by selling the IPO shares in the aftermarket.[5] *Id.* All of the allegations regarding profit-sharing and market manipulation by the investment banks were made public and likely known to most of the shareholders of these companies as early as 2001.

In the instant case, Ms. Simmonds filed her complaints for short-swing transactions based on the same set of facts as presented in *In re IPO*, albeit under a new theory of liability and almost six years later. Specifically, Ms. Simmonds claims that the Underwriter Defendants are liable for short-swing profits allegedly made in violation of Section 16(b) because the Underwriter Defendants were statutory insiders of the issuing companies and profited from their customers' short-swing transactions that

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[5] Judge Scheindlin's February 19, 2003 order on defendants' motion to dismiss in *In re IPO*, 241 F. Supp. 2d 281 (S.D.N.Y. 2003), provides a detailed explanation of the alleged market manipulation and fraudulent scheme surrounding the 1998-2000 IPO market, as well as a historical perceptive on the financial climate leading up to this period.

involved stock of the issuing companies. (*See, e.g.*, Onvia Compl. ¶¶ 19-20.)

First, Ms. Simmonds contends that the Underwriter Defendants were statutory insiders because they beneficially owned more than 10 percent of the issuing companies' stock. (*See, e.g., id.* at ¶ 19.) Even if they owned less than 10 percent of the stock directly, she claims that they also shared beneficial interest in stock owned by directors, officers, and other significant shareholders (i.e., insiders) of the issuing companies because they entered into lock-up agreements[6] and agreed to price IPO shares at a small fraction of what they knew to be the likely aftermarket price. (*See, e.g., id.* at ¶¶ 16-17.)

Second, Ms. Simmonds alleges that the purchases and sales involving issuer stock occurred within a period of less than six months by referring to the sales as occurring in the "immediate aftermarket" of the IPO. (*See, e.g., id.* at ¶ 20.) She also notes the large discrepancy between the amount investors paid for the IPO stock and the amount at which the investors sold the stock in the immediate aftermarket. (*See, e.g., id.* at ¶ 18 ("The 9.2 million shares of [issuer] stock sold in connection with its IPO raised $197.7 million for [the issuer] - less than one-third of what buyers paid for [the issuer] shares in the immediate aftermarket.")).

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[6] "These lock-up agreements provided that, subject to limited exceptions, the stockholder could not offer, sell, contract to sell, pledge or otherwise dispose of any Onvia common stock or securities for a period of 180 days after the effective date of the IPO." (Onvia Compl. ¶ 16.)

Third, Ms. Simmonds claims that the Underwriter Defendants had a pecuniary interest in these transactions because they "shar[ed] in the profits of the customers to whom they made IPO allocations of [issuer] stock." (*See, e.g., id.* at ¶ 20.) She also asserts that the Underwriter Defendants allegedly had a pecuniary interest in these short-swing profits because they allocated "shares of [issuer] stock to executives and other high-level insiders of other companies, both private and public, from which [they] expected to receive new or additional investment banking business in return" and created "the opportunity for other [issuer insiders] to derive personal financial benefits from the sale of [issuer] stock into an inflated market, in an effort by [them] to obtain future investment banking business from [the issuer]." (*See, e.g., id.*)

The Defendants move to dismiss Ms. Simmonds' claims on various different theories. Some of the Issuer Defendants joined in a motion seeking to dismiss the complaints against them arguing that (1) Ms. Simmonds lacks standing to pursue these claims because her demand letters were boilerplate and lacked the requisite specificity and (2) Ms. Simmonds' claims are time-barred by the two-year statute of limitation for Section 16(b) claims. The Underwriter Defendants move separately to dismiss the 54 complaints on the following bases: (1) the Underwriter Defendants do not meet the two-prong test for pleading "beneficial ownership"; (2) the allegations that the Underwriter Defendants had a pecuniary interest in the issuer stock are insufficient; (3) Ms. Simmonds fails to plead a specific purchase or sale within a six-month period; (4) Ms. Simmonds' claims are time-barred by the two-year statute of limitation for Section 16(b) claims; (5) the Underwriter

Defendants are shielded from Section 16(b) liability by the underwriter's exemption;[7] (6) the Underwriter Defendants are shielded from Section 16(b) liability by the market-making exemption;[8] and (7) Ms. Simmonds fails to plead lack of good faith with particularity. Intersil Corporation ("Intersil") moves to dismiss the complaint against it on the basis that Ms. Simmonds failed to ensure that it received her demand letter. Issuer Defendants Audible Inc. ("Audible") and Packeteer Inc. ("Packeteer") move to dismiss the complaints against them on the basis that both companies were subject to a cash-out merger or acquisition shortly after Ms. Simmonds filed her complaints against them.

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[7] The underwriter's exemption generally provides that "[a]ny purchase and sale, or sale and purchase, of a security that is made in connection with the distribution of a substantial block of securities" is exempt from Section 16 requirements. 17 C.F.R. 240.16a-7.

[8] Section 16(d) provides an exemption for short-swing profits made in the ordinary course of business and incident to market-making activities. 15 U.S.C. § 78p(d). In order to maintain a market for securities not traded on a central exchange, "designated broker-dealers operate as 'market makers' in the over-the-counter markets, buying and selling as principals for their own account rather than as agents for their customers." 1 THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 14.10[2] (4th ed. 2004). Acting as a principal, the market-maker sells stock to investors and buys stock from investors, often adding a "mark-up" to the price as its compensation. *See Shivangi v. Dean Witter Reyonlds, Inc.*, 825 F.2d 885, 887 (5th Cir. 1987).

III. ANALYSIS

A. Statutory Framework

1. Strict Liability for Short-Swing Profits Under Section 16(b)

Section 16(b) provides that a corporation may recover profits realized by corporate insiders from the purchase and sale of securities that occur inside a six-month period (so-called "short-swing trades"). 15 U.S.C. § 78p(b). Section 16(b) provides, in relevant part:

> For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer . . . shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security . . . . Suit to recover such profit may be instituted . . . by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized.

15 U.S.C. § 78p(b).

Should the issuing corporation fail or refuse to bring such suit, a security holder may bring a derivative action on the corporation's behalf. *Id.* The purpose of Section 16(b) is to discourage corporate insiders from taking advantage of their access to non-public information by imposing a flat rule that prohibits an entire category of six-month purchase and sale transactions. *Foremost-McKesson, Inc. v. Provident Sec. Co.*, 423 U.S. 232, 234 (1976). The statute imposes strict liability on insiders who engage in short-swing trades without regard to the insider's intent. *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 430-31 (1972); *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 121-22 (2d Cir. 2001).

Corporate insiders subject to Section 16(b)'s prohibition of short-swing trading include officers, directors, and "beneficial owners," the latter of which is defined as a "person" holding ten percent of the issuing corporation's securities. 15 U.S.C. § 78p(a). If two or more persons form a "group," each group member may be liable under Section 16(b) if the group's holdings exceed ten percent in the aggregate. 17 C.F.R. § 240.16a-1(a)(1)(2); *see also Rosen v. Brookhaven Capital Mgmt Co., Ltd.*, 113 F. Supp. 2d 615, 618-20 (S.D.N.Y. 2000) (discussing Section 16(b) group liability as borrowed from the group definition for disclosure requirements under Section 13(d), 15 U.S.C. § 78m(d)(3)).

In passing Section 16, "Congress recognized that insiders may have access to information about their corporations not available to the rest of the investing public. By trading on this information, these persons could reap profits at the expense of less well informed investors." *Foremost,* 423 U.S. at 243. The ultimate

purpose of Section 16 is to prevent the unfair use of information obtained by an insider through his or her relationship to the issuer. 15 U.S.C. § 78p(b). Courts refer to Section 16's provisions as "prophylactic measures" that protect against insider abuse by prohibiting all transactions in which the possibility of abuse is believed to be intolerably great, even if there is no proof of actual abuse. *See Reliance,* 404 U.S. at 422. Although Congress addressed some aspects of insider abuse through other remedies, the scope of Section 16 is not affected by the existence of alternative sanctions. *Foremost,* 423 U.S. at 255.

Under Section 16(b), a corporation, or a security holder via a derivative action, may recover profits realized by an insider subject to Section 16(a). 15 U.S.C. § 78p(b). The action must be brought within two years of the transaction. *Id.* If the insider fails to disclose a covered transaction in the required Section 16(a) reports, the two-year limitation period may be tolled with respect to the non-disclosed transaction. *Whittaker v. Whittaker Corp.,* 639 F.2d 516, 530 (9th Cir. 1981).

In sum, Section 16(b) liability attaches if a plaintiff proves: (1) a purchase, and (2) a sale of securities, (3) by an officer, director, or beneficial owner of more than ten percent of the issuer's securities, (4) within a six-month period. *Gwodzdzinsky v. Zell/Chilmark Fund, L.P.*, 156 F.3d 305, 308 (2d Cir. 1998).

2. Reporting Requirements of Section 16(a)

At the time of the disputed transactions in this case, Section 16(a) required insiders to disclose their initial ownership interests and subsequent changes

thereto, within ten days of a transaction. 15 U.S.C. §§ 78p(a)(B)-(C)(2001).[9] Initial statements of ownership interest are reported on Form 3 while changes in ownership interest are reported on Form 4.[10] 17 C.F.R. § 240.16a-3(a). Section 16(a)'s publicity requirement is designed to afford indirect protection against potential misuses of inside information. *Foremost,* 423 U.S. at 255-56. Congress recognized that stockholder trading is also subject to abuse when the size of the stockholder's ownership affords the potential to access corporate information. *Id.* Accordingly, an insider subject to Section 16(a) reporting requirements includes a beneficial owner of more than 10 percent of a class of registered equity securities as well as directors and officers. 15 U.S.C. § 78p(a)(1).

B. Issuer Defendants' Motion to Dismiss

The Issuer Defendants move to dismiss 30 of Ms. Simmonds' complaints pursuant to Federal Rule of Civil Procedure 12(b)(1). Rule 12(b)(1) permits the

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[9] In 2002, Congress passed the Sarbanes-Oxley Act, which, in part, amended Section 16(a) to now require insiders to electronically disclose changes in their equity interest "before the end of the second day on which the subject transaction has been executed." 15 U.S.C. § 79p(a)(2)(C).

[10] Under Form 4, a beneficial owner subject to Section 16(a) reporting requirements must report *each transaction* in which the owner has a pecuniary interest including the owner's proportionate interest in transactions conducted by another entity. Each transaction must be reported on a separate line. Ownership Reports and Trading By Officers, Directors and Principal Security Holders, SEC Release No. 25254, 48 S.E.C. Docket 216 (February 21, 1991).

court to dismiss a claim for lack of subject matter jurisdiction based on standing. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003). A jurisdictional challenge under this provision may be made on the face of the pleadings or by presenting extrinsic evidence. *Id.* at 1139. When resolving jurisdiction depends on the merits of a case, a court may not resolve genuinely disputed facts. *Id.* Instead, the court must "assume[ ] the truth of the allegations in a complaint . . . unless controverted by undisputed facts in the record." *Id.* (quoting *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987)). At this stage of pleading, the non-moving party needs only to show that the facts alleged, if proved, would confer standing. *Id.* at 1140 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998)). Dismissal is only appropriate if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (citing *Conley v. Gibson*, 355 U.S. 41, 44-46 (1957)).

In their joint motion to dismiss, 30 of the Issuer Defendants claim that the demand letters, and the follow-up letters, sent by Ms. Simmonds were inadequate. The Issuer Defendants argue that Ms. Simmonds lacks standing to bring a Section 16(b) action because she failed to sufficiently demand that they bring suit against the Underwriter Defendants before she filed this derivative action. The parties agree that Ms. Simmonds sent letters to the issuing companies' boards of directors demanding that they bring suit under Section 16(b) against the Underwriter Defendants. The moving Issuer Defendants, however, claim that the demands were insufficient because they failed to (1) properly identify company insiders, (2)

describe the factual basis of the wrongful acts, and (3) describe the alleged short-swing profits.

Ms. Simmonds argues that the demands were sufficient because she was not required to provide the companies with specific allegations when she was not privy to all the necessary information. Ms. Simmonds further contends that the Issuer Defendants had notice of her theory of the case because she sent follow-up letters that referred to "laddering" and "spinning."[11]

The question of the adequacy of Ms. Simmonds' pre-lawsuit demand is one of standing. Without standing, the court lacks subject-matter jurisdiction over these cases and must dismiss them without reaching the merits. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). *But see Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1042 (9th Cir. 1999) (finding that the district court's assumption of Article III standing did not violate the rule that a federal court may not hypothesize subject-matter jurisdiction for the purpose of deciding the merits). In this instance because only 30 of the 54 Issuer Defendants attacked Ms. Simmonds' standing and provided sufficient

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[11] Laddering is a term used to describe the situation wherein an underwriter induces "investors to give orders to purchase shares in the aftermarket at pre-arranged, *escalating prices* in exchange for receiving IPO allocations." Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations, Exchange Act Release No. 34-51500, 70 Fed. Reg. at 19672-01 (April 13, 2005) *Id.*, at 142-43 (internal quotations omitted) (emphasis in original). Spinning refers to the underwriters' distribution of IPO shares to high-level insiders of other companies expecting to obtain future underwriting business in return. *See* Hazen, supra, § 6.3[2].

information for the court to evaluate the challenge, the court only considers the standing issue with respect to the moving Issuer Defendants.

1. Adequacy of Demand Letters

The Issuer Defendants claim that Ms. Simmonds failed to meet the demand requirement pursuant to Section 16(b). Although no Ninth Circuit case law directly addresses this point, other federal courts have held that only the issuing corporation has standing to object to any deficiency in, or even the total absence of, a shareholder's demand. *See Dreiling v. Am. Express Travel Related Serv. Co. Inc.*, 351 F. Supp. 2d 1077, 1084 (W.D. Wash. 2004) *rev'd on other grounds*, 458 F.3d 942 (9th Cir. 2006); *see also Colan v. Monumental Corp.*, 524 F. Supp. 1023, 1028 (N.D. Ill. 1981); *Prager v. Sylvestri*, 449 F. Supp. 425, 429 (S.D.N.Y. 1978).

While Section 16(b) creates the requirement for a demand, Federal Rule of Civil Procedure 23.1 is the procedural manifestation of the state law of corporate governance regarding the right of a shareholder to bring a derivative suit on behalf of a corporation. *Dreiling*, 351 F. Supp. 2d at 1085; *Levner v. Al Saud*, 903 F. Supp. 452, 456 (S.D.N.Y. 1994). Rule 23.1 states that the complaint must "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority." Fed. R. Civ. P. 23.1. In each of her complaints, Ms. Simmonds describes the demand letters she sent to each of the issuing companies. The substantive question of whether the demand letters are sufficient is governed by the law of the state of incorporation. *Dreiling*, 351 F. Supp. 2d at 1085;

Levner, 903 F. Supp. at 456. All of the moving Issuer Defendants are incorporated in Delaware.[12]

Under Delaware law, a demand made upon the board of directors must at least "identify the alleged wrongdoer, describe the factual basis of the wrongful acts, the harm caused to the corporation, and request remedial relief." *Dreiling*, 351 F. Supp. 2d at 1085 (quoting *Levner*, 903 F. Supp. at 456). The shareholder generally does not need to specify the legal theory, or every fact in support of that theory, but does need to specify the facts demonstrating the wrongful act. *Levner*, 903 F.Supp. at 456. The court in *Dreiling* found that the demand was substantively sufficient because it provided notice to the issuing company of who the alleged wrongdoers were, what the alleged wrong was, and the requested relief. 351 F. Supp. 2d at 1085. In the demand letter, the plaintiff informed the board that "American Express Company (directly or through it subsidiaries) sold substantial amounts of [the issuing company's] stock from February 25, 2000 through August 24, 2000, thereby violating Section 16(b)'s prohibition against short-swing trading by company insiders" and "demand[ed] that the Board of Directors prosecute claims against American Express Company for violations of Section 16(b)." *Id.* Even though American Express Company had many subsidiaries, the court determined that the shareholder sufficiently identified the wrongdoer, wrongful acts, and company harm in its demand

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[12] All of the remaining Issuer Defendants are also incorporated in Delaware except for two Issuer Defendants that are incorporated in California, one that is incorporated in Washington and one in Bermuda.

letters. *Id.* Moreover, the court found that the shareholder adequately requested remedial relief by demanding that the board compel the alleged insider to disgorge its profits under Section 16(b). *Id.*

Similar to the demand letters in *Dreiling*, the demand letters in this case sufficiently identify the alleged wrongdoers by demanding that the issuing company bring suit against its lead IPO underwriters. Unlike the demand letters in *Dreiling*, however, the demand letters here fail to sufficiently identify the factual basis of the wrongful acts, the harm caused to the corporation, and the requested remedial relief. The demand letters sent to the moving Issuer Defendants are nearly identical. The letters describe the alleged wrongful act, damage, and remedial remedy in a single paragraph:

> Notwithstanding the short-swing trading prohibition of Section 16, the group, through its members engaged in purchase and sales of company shares within periods of less than six months during [the one-year relevant period]. Additionally, despite the reporting requirements of Section 16(a), neither the group nor its members filed Section 16(a) reports for these purchase and sale transactions. The group members should therefore be compelled to disgorge the profits they made through the purchase and sales of Company Stock during [the one-year relevant period].

(Issuer's Joint Motion to Dismiss (Dkt. # 56), Ex. D). A few demand letters do identify certain of the Underwriter Defendants involved in the transactions, but describe with similar brevity the alleged wrongful

act, damage, and remedial remedy in a single paragraph.

Ms. Simmonds' demand letters do not describe the same alleged wrongdoing that she later describes in her complaints. Unlike American Express in *Dreiling*, the Underwriter Defendants are not alleged to have committed a wrong by merely selling shares they directly owned in less than a six-month period. Instead, in her complaints, Ms. Simmonds contends that the alleged short-swing transactions were not executed by the Underwriter Defendants but by customers to whom the underwriters had allocated IPO shares. She also infers that the alleged damage to the issuing companies was the difference between the amount the shares sold for in the IPO and the amount the shares sold for in the immediate aftermarket. Moreover, according to the complaints, the remedial remedy would be disgorgement of the amount the Underwriter Defendants earned from the customer transactions, and not the customers' profits in their entirety. The demand letters mention none of this and therefore did not put the Issuer Defendants on notice that Ms. Simmonds was demanding that the corporation compel the Underwriter Defendants to disgorge profits they earned when customers to whom they allocated IPO shares sold such shares in the aftermarket.[13]

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[13] Ms. Simmonds not only fails to identify the remedial nature of her demand but also fails to identify any transaction wherein an Underwriter Defendant shared in the profit of any of its investing customers who sold shares in the aftermarket. The theory is not only novel but based almost entirely on conjecture.

Ms. Simmonds' demand letters are also insufficient because the factual basis of the alleged wrongful acts is premised upon mere suspicion and lacks the requisite specificity to give the directors a fair opportunity to initiate suit. In *Levner*, the court found that the plaintiff's demand letter was inadequate because it "simply was not adequately particular to alert the [issuing company's] board as to the corporate injury, or the relief sought." 903 F. Supp. at 456. The demand letter in *Levner* set forth the factual basis for the alleged wrongdoing by stating that "[i]n light of [this transfer], plaintiff also requested that [the issuing company] take action with respect to the possibility that [the defendant] was acting on behalf of others in connection with his purported purchase of [the shares]." *Id.* at 455-56. Similarly, Ms. Simmonds bases her complaint on the mere suspicion that the Underwriter Defendants shared in the profit from the shares their customers sold in the immediate aftermarket. Ms. Simmonds' demand letters, however, do not even share this suspicion with the issuing companies. Instead, she states only generally that the Underwriter Defendants made profits from purchases and sales, without providing the particularity that the board would need in order to make an informed decision about whether to bring a lawsuit. "The purpose behind the demand requirement is to give the directors of a corporation the initial opportunity to redress the wrong." *Id.* at 456. Ms. Simmonds' demand letters are completely lacking in the specificity that would give the directors a "fair opportunity to initiate the action, [that she] subsequently undertook," which is the primary purpose of the demand requirement. *Shlensky v. Dorsey*, 574 F.2d 131, 141 (3d Cir. 1978).

At oral argument on this motion, Ms. Simmonds' counsel suggested that Ms. Simmonds need not provide all the *Levner* information in the demand letter because the information relating to the concerted activity was contained in the SEC complaints and the Issuer Defendants should just "go look in [their] own files" for an explanation of the "Simmonds' theory." (Tr. (Dkt. # 77) at 27 (explaining that the "thing the SEC is unhappy with you about is the set of transactions that forms the basis of our claim.").) Even assuming that telling the corporations to "go look in their own files" to understand the shareholder's theory for a derivative lawsuit is sufficient, Ms. Simmonds nevertheless made no effort to explain to the Issuer Defendants how the conduct that formed the basis of the *In re IPO* litigation also supports a claim for Section 16(b) liability.

When questioned at oral argument regarding the form of relief Ms. Simmonds seeks and whether this relief is explained in the demand letters, Ms. Simmonds' counsel stated that the theory of relief may or may not be described in the demand letters but that, even if it was not, Ms. Simmonds was merely claiming disgorgement of profits. (Tr. at 28.) Ms. Simmonds' counsel then argued that she is simply claiming disgorgement from "short-swing profits from pair trades involving specific purchase and sales [the Underwriter Defendants] know [of] and we don't." (*Id.*) Even this explanation, however, does not adequately explain Ms. Simmonds' theory of relief. As the court interprets her theory, Ms. Simmonds is not claiming the traditional disgorgement of profits from customers who engaged in short-swing trades, but rather disgorgement of profits from underwriters whose clients - who are not insiders - engaged in short-swing

trades. Thus, Ms. Simmonds is not seeking disgorgement of the customers' profits from the customer; rather, she seeks disgorgement of profits the underwriters allegedly received from the short-swing trades of their customers. Without analyzing whether this theory is legally cognizable, the court is satisfied that nothing in the demand letters sent to the Issuer Defendants, nor in any of the follow-up letters, explains Ms. Simmonds' multi-layered theory of recovery of profits from short-swing trades.

In her response to the motion to dismiss, Ms. Simmonds points to the additional information that she provided to the issuing companies in follow-up letters. (Resp. (Dkt. # 59) at 8). This additional information, however, only pertains to the "group activity related to 'laddering' and 'spinning' connected to the IPO." (*Id.*) Ms. Simmonds did not provide any further indication to the boards of any of the Issuer Defendants that the purchases and sales that harmed the issuing company were actually made by the Underwriter Defendants' customers. Even considering the additional information provided by Ms. Simmonds, the court finds that Ms. Simmonds failed to give the boards of these companies a sufficient factual basis of the wrongful conduct alleged (i.e., the nature of the purchase and sales), the harm done to the company, or the remedial remedy she seeks. If Ms. Simmonds was simply claiming that the Underwriter Defendants directly owned shares and sold them in violation of Section 16(b), the demand letters would probably suffice. As Ms. Simmonds' complaints illustrate, however, her claims are much more complex and novel, requiring a higher level of specificity to put the boards on notice. Although Ms. Simmonds is correct in arguing that she is not required to identify each

specific transaction, she is required to disclose, at minimum, the factual basis for her claims.

Finally, Ms. Simmonds argues that she was not required to make demands upon the issuing companies' boards because such demands would be futile. Under Delaware law, once a shareholder plaintiff makes a demand upon the directors before filing suit, he or she loses the ability to claim demand futility. *Levner*, 903 F.Supp. at 456. Because Ms. Simmonds' demands are insufficient under Delaware law and Rule 23.1, the court dismisses her complaints without prejudice. The court will not permit Ms. Simmonds to amend her demand letters while pursuing this action. *See Shlensky*, 574 F.2d at 142 (citing *In re Kauffman Mutual Fund Actions*, 479 F.2d 257, 263 (1st Cir. 1973) ("[T]o hold that demands to satisfy Rule 23.1 may be made on the directors *after* a derivative suit has been initiated would be to reduce the demand requirement of the rule to a meaningless formality.")). The purpose of the demand is to afford the corporation the opportunity to address the alleged wrong without litigation, to decide whether to invest corporate resources, and to control any litigation that does occur. It appears to the court when it considers the carbon-copy form of Ms. Simmonds' 54 demand letters, as well as her vague description of the nature of the alleged wrong, that Ms. Simmonds approached the pre-suit demand requirement as a perfunctory task before instituting these actions and pursuing her novel theory of liability. Accordingly, the court must dismiss

the complaints against the 30 moving Issuer Defendants without prejudice.[14]

C. Underwriter Defendants' Motion to Dismiss

The Underwriter Defendants move to dismiss Ms. Simmonds' claims pursuant to Federal Rule of Civil Procedure 12(b)(6). When considering a motion to dismiss under Rule12(b)(6), the court construes the complaint in the light most favorable to the nonmoving party. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). The court must accept all well-pleaded facts as true and draw all reasonable inferences in favor of the plaintiff. *Wyler Summit P'ship v. Turner Broad. Sys.*, 135 F.3d 658, 661 (9th Cir. 1998). The court's review of the record on a Rule 12(b)(6) motion is generally limited to the complaint itself. *Marder v. Lopez,* 450 F.3d 445, 448 (9th Cir. 2006). The court may, however, rely on facts subject to judicial notice. *States v. Ritchies,* 342 F.3d 903, 908 (9th Cir. 2003). For instance, the court may consider a plaintiff's clarifications in their briefing and at oral argument. *Pegram v. Herdich,* 530 U.S. 211, 230 n.10 (2000) (citing, *Alicke v. MCI Commc'ns Corp.*, 111 F.3d 909, 911 (D.C. Cir. 1997) (citations omitted),

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[14] The remaining 24 Issuer Defendants have not moved to dismiss Ms. Simmonds' complaints for failure to satisfy the pre-suit demand requirement. The court is unable to dismiss the remaining complaints on this basis alone. Although the court may assume that Ms. Simmonds provided the same description of her theory regarding the alleged short-swing transactions to the remaining 24 Issuer Defendants, without something in the record setting forth the extent of information provided to these Issuer Defendants, the court cannot evaluate whether to dismiss the complaints against them for this reason.

in which the court relied on statements in oral argument to clarify complaint).

A court can dismiss an action under Rule 12(b)(6) where the plaintiff fails to allege either a cognizable legal theory or sufficient facts in support of a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). While a complaint need not contain detailed factual allegations, a plaintiff's obligation to provide the grounds entitling him to relief requires more than mere labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. *Bell Atl. Corp. v. Twombly*, __ U.S. __,127 S. Ct. 1955, 1964-65 (2007) (citations omitted). The complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Id.* Specific facts are not necessary. *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1121-22 (9th Cir. 2008) (citations omitted). The complaint need only advise the defendant of what the claim is and the grounds upon which it rests. *Id.* (applying *Twombly* to a complaint alleging a civil rights violation pursuant to 42 U.S.C. § 1981).

As discussed above, the Underwriter Defendants seek to dismiss the remaining 54 complaints on the following bases: (1) the Underwriter Defendants do not meet the two-prong test for pleading "beneficial ownership"; (2) the allegations that the Underwriter Defendants had a pecuniary interest in the issuer stock are insufficient to support a group theory; (3) Ms. Simmonds fails to plead a specific purchase or sale within a six-month period; (4) Ms. Simmonds' claims are time-barred by the two-year statute of limitation for Section 16(b) claims; (5) the Underwriter Defendants are shielded from Section 16(b) liability by

the Underwriter's Exemption; (6) the Underwriter Defendants are shielded from Section 16(b) liability by the Market-Making Exemption; and (7) Ms. Simmonds fails to plead lack of good faith with particularity. The court considers the fourth basis – the two-year statute of limitations – dispositive and therefore considers it first.

1. Application of Equitable Tolling

Because only 30 of the 54 Issuer Defendants moved to dismiss Ms. Simmonds' claims based on failure to provide an adequate demand and only the Issuer Defendants have standing to bring such a challenge, the court moves on to address the Underwriter Defendants' motion to dismiss in the remaining 24 cases.

Even though claims under Section 16(b) must be brought within two years after the alleged transaction occurs, the statutory period may be tolled if the beneficial owner fails to report the transaction as required under Section 16(a). *Whittaker*, 639 F.2d 516 at 528. The Underwriter Defendants, as well as the Issuer Defendants, argue that the statute of limitations bars any Section 16(b) claim because the Underwriter Defendants were not subject to Section 16(a) reporting requirements. As discussed further below, the court finds that the Issuer Defendants' shareholders were fully advised of the facts giving rise to Ms. Simmonds' claim well over five years before Ms. Simmonds filed these actions. As such, the court is not persuaded that equity is furthered by tolling the limitations period in these cases.

The Underwriter Defendants contend that the statute of limitations expired because shareholders had the necessary information to assert a Section 16(b) claim more than two years ago. Under the "disclosure" interpretation adopted by the Ninth Circuit, an insider's failure to disclose covered transactions in the required Section 16(a) reports tolls the two-year limitations period connected with such a non-disclosed transaction. *Whittaker*, 639 F.2d at 527. In *Whittaker*, the Ninth Circuit held that the period beings to run when the transactions are disclosed in the insider's Section 16(a) report. *Id.* The Ninth Circuit rejected the more lenient "notification" approach which triggers the running of the two-year period once the corporation (and thus indirectly the shareholders) has sufficient information to put it on notice of its Section 16(b) claims. *Id.* at 529. Instead, it adopted the disclosure interpretation, in part, to ensure notification to shareholders, but also to recognize Congress' goal "to impose absolute accountability within clearly demarcated boundaries" under Section 16. *Id.*

> This goal of clear boundaries is served by a limitations period which can be mechanically calculated from objective facts. The dates on which purchases and sales are made are such facts, as are the dates on which Section 16(a) reports are filed with the SEC. By contrast, under the notice interpretation, the running of the limitations period would depend on uncertain determinations of what knowledge should lead a corporation to discover its cause of

> action. Thus, the disclosure interpretation better serves the statute's purpose than the notice interpretation.

Id.

More recently, the Second Circuit allowed the statutory limitations period to run until the company (and shareholders) received actual notice "tantamount to a Form 4" regarding a transaction. *Litzler v. CC Invs. L.D.C.*, 362 F.3d 203, 208 (2d Cir. 2004). In adopting an actual notice standard, the Second Circuit recognized that requiring actual notice created uncertainty with respect to otherwise long-settled transactions. *Id.* at 208 n.5. It nevertheless concluded that actual notice better served the goals of Section 16 because it neither required identifying "circumstances in which a person would or should have realized the non-compliance" nor relied on "the ability of a shareholder or company to piece together the substance of a Form 4 from disparate sources of information." *Id.* at 208. The Second Circuit did not divorce equitable tolling from justifiable circumstances completely, however. *Id.* (stating that "[a]ssuming the circumstances are found to justify equitable tolling in this case" then tolling would end on the date by which the plaintiff received actual notice of the claim). Judge Jacobs, writing for the Second Circuit in *Litzler*, cautioned in a footnote that allowing the statute of limitations to be tolled solely because a defendant failed to file Section 16(a) reports would result in indefinite liability, thereby "affect[ing] long-settled transactions [that] might hang forever over honest persons." *Id.* at 208 n.5.

Here, unlike *Whittaker* and other cases employing the equitable tolling doctrine in Section 16(b) cases, there is no dispute that all of the facts giving rise to Ms. Simmonds' complaints against the Underwriter Defendants were known to the shareholders of the Issuer Defendants for at least five years before these cases were filed. The only recent development giving rise to these claims is Ms. Simmonds' acquisition of shares in the 54 Issuer Defendants' companies. Of note, there is no dispute that the shares were acquired at the direction of Ms. Simmonds' father who is a securities lawyer with experience in Section 16(b) litigation. While the court need not consider the steps taken in attempting to establish standing in these cases to determine whether equitable tolling is appropriate, the court does rely on the fact that the only significant development occurring within the last two years was Ms. Simmonds' acquisition of the shares in these companies. All other facts relied upon in these cases were known to the shareholders over five years before these complaints were filed. This leads the court to seriously question the application of principles of equity to the cases before it.

The definition of equity, i.e., the "recourse to principles of justice to correct or supplement the law as applied to particular circumstances" or the "body of principles constituting what is fair and right," persuades the court that equitable tolling does not apply to the situation before it. BLACK'S LAW DICTIONARY 579 (8th ed. 2004); *see also U.S. ex rel. Hyatt v. Northrup Corp.*, 91 F.3d 1211, 1216 (9th Cir. 1996) (explaining that equitable tolling is read into every federal statute and that the rationale behind tolling requires that the statute of limitations start to run when the plaintiff acquires knowledge of the

wrongful activity). The court indicated its hesitation to apply these principles to Ms. Simmonds' complaints at oral argument. Ms. Simmonds' counsel responded that the court could simply give the doctrine another name. (Tr. at 34.) Changing the nomenclature, however, does not change the court's conclusion that tolling is not appropriate in this case.

While the *Whittaker* court adopted a bright-line test for determining whether a "disclosure" by an insider of the corporation has been made in order to determine the tolling of the statute, the *Whittaker* decision does not resolve whether the statute should be tolled in this case. In *Whittaker*, the court was faced with a much different factual situation. The defendant in *Whittaker*, William Whittaker, was a corporate insider of Whittaker Corporation as was his mother, Beuleh Whittaker. *Whittaker*, 639 F.3d at 518. Mr. Whittaker failed to disclose to the corporation that he had total control over the shares owned by his mother and was thus a beneficial owner of her shares. *Id.* at 523. When the corporation learned the full extent of Mr. Whittaker's control over his mother's shares it compiled a list of short-swing trades using both accounts. *Id.* at 519. It then demanded payment from Mr. Whittaker of the profits he realized from the short-swing trades. *Id.* Mr. Whittaker paid the demand and then sued for a declaration of nonliability under Section 16 and to recover the money he paid. *Id.*

The district court in *Whittaker* held that Mr. Whittaker was liable for short-swing trades but only those made during the statutory two-year period, which cut out a substantial portion of the corporation's recovery – almost four years of trades were eliminated. *Id.* The Ninth Circuit, under those facts, held that the

two-year period was tolled, essentially indefinitely, until Mr. Whittaker filed his Form 4. *Id.* at 530. The Ninth Circuit reasoned that it was providing "absolute accountability within clearly demarcated boundaries." *Id.* This reasoning does not apply in this case. Here, there are no "demarcated boundaries" because the novelty of Ms. Simmonds' theory neither gives the insiders sufficient notice of the possibility of having to file a Form 4 (i.e., the underwriters should have known that allocating IPO shares to their best customers in return for more business could lead to Section 16(b) liability) nor does it provide any end date of liability for the issuing companies or the underwriters.[15] Indeed, Ms. Simmonds' counsel acknowledged that under her theory she could buy stocks in companies who had IPOs 20 years ago and bring claims for short-swing transactions if the underwriters had undervalued a stock. The court is not persuaded that permitting shareholders to go back 20 years with novel claims for Section 16(b) liability would further the congressional intent of the statute. Accordingly, the court does not apply equitable tolling to Ms. Simmonds' claims.

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[15] The court questioned whether Ms. Simmonds was claiming that she was not "on notice" of the claim because the Underwriter Defendants had not filed their Form 4. Ms. Simmonds' counsel candidly responded that he did not know the answer to that question. He then went on to explain that if she is considered to be on notice, he would go out and find a plaintiff that was not on notice. (Tr. at 32.) This exchange accurately reveals the incongruent result when the bright-line rule set forth in *Whittaker* is applied to the facts in this case. Until such time as the Underwriter Defendants file a Form 4 – essentially admitting liability – the statute is tolled forever.

IV. CONCLUSION

For the reasons stated, the court GRANTS in part and DENIES in part the motions before it. The court GRANTS the motion to dismiss filed by 30 of the Issuer Defendants in C07-1549 (Dkt. # 56) without prejudice. The court GRANTS the omnibus motion to dismiss filed by the Underwriter Defendants in C07-1549 (Dkt. # 57) as to the remaining 24 cases. The court dismisses these complaints with prejudice. The remaining motions are DENIED as MOOT: the supplemental individual motion to dismiss filed by Issuer Defendant Intersil Corporation in C07-1572 (Dkt. # 47); the supplemental individual motion to dismiss filed by Issuer Defendant Audible Inc. in C07-1623 (Dkt. # 33); and the supplemental individual motion to dismiss filed by Issuer Defendant Packeteer Inc. in C07-1654 (Dkt. # 39).

Dated this 12th day of March, 2009.

/s/ James L. Robart
JAMES L. ROBART
United States District Judge

AO 450 (Rev 5/85): Judgment in a Civil Case

United States District Court
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In Re: Section 16(b) Litigation

JUDGMENT IN A CIVIL CASE

MASTER CASE NUMBER: C07-1549JLR

____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ **Decision by Court.** This action came to consideration before the Court. The issues have ben considered and a decision has been rendered.

The court granted the motion to dismiss filed by 30 of the Issuer Defendants in C07-1549 (Dkt. # 56). The court dismisses the complaints in the following cause numbers without prejudice: C07-1549; C07-1567, C07-1570, C07-1571, C07-1572, C07-1573, C07-1576, C07-1584, C07-1587, C07-1588,C07-1589, C07-1590, C07-1594, C07-1595, C07-1597, C07-1598, C07-1605, C07-1623, C07-1624, C07-1629, C07-1631, C07-1633, C07-1637, C07-1652, C07-1653, C07-1654, C07-1655, C07-1666, C07-1667, C07-1669;

The court granted the omnibus motion to dismiss filed by the Underwriter Defendants in C07-1549 (Dkt. # 57) as to the remaining 24 cases: C07-1566, C07-1568,

C07-1569, C07-1575, C07-1577, C07-1578, C07-1579, C07-1580, C07-1581, C07-1582,C07-1583, C07-1585, C07-1593, C07-1626, C07-1627, C07-1628, C07-1630, C07-1632, C07-1634, C07-1635, C07-1636, C07-1638, C07-1668, C07-1670. The court dismisses these complaints with prejudice.

Dated this 12th day of March, 2009.

BRUCE RIFKIN
Clerk

s/Mary Duett

Deputy Clerk

APPENDIX C

LIST OF IN RE SECTION

Case Name
*Simmonds v. Credit Suisse Securities (USA) LLC, et al.**
Simmonds v. Deutsche Bank Securities Inc., et al.
Simmonds v. Merrill Lynch, Pierce, Fenner & Smith Inc., et al.
Simmonds v. Morgan Stanley & Co. Incorporated, et al.
Simmonds v. Goldman Sachs & Co., et al.
Simmonds v. Morgan Stanley & Co. Incorporated, et al.
Simmonds v. Morgan Stanley & Co. Incorporated, et al.
Simmonds v. Credit Suisse Securities (USA) LLC, et al.
Simmonds v. Morgan Stanley & Co. Incorporated, et al.
Simmonds v. Credit Suisse Securities (USA) LLC, et al.
Simmonds v. Credit Suisse Securities (USA) LLC, et al.
Simmonds v. Goldman Sachs & Co., et al.
Simmonds v. Goldman Sachs & Co., et al.
Simmonds v. Credit Suisse Securities (USA) LLC, et al.
Simmonds v. Credit Suisse Securities (USA) LLC, et al.
Simmonds v. Credit Suisse Securities (USA) LLC, et al.
Simmonds v. Bank of America Corporation, et al.
Simmonds v. Credit Suisse Securities (USA) LLC, et al.
Simmonds v. Credit Suisse Securities (USA) LLC, et al.
Simmonds v. Bank of America Corporation, et al.
Simmonds v. Goldman Sachs & Co., et al.

* Both the District Court and the Ninth Circuit designated this

16(b) PROCEEDINGS

District Court Case No.	Appeal	9th Cir. Appeal No.	Cross-Appeal	9th Cir. Cross-Appeal No.
C07-1549	✓	09-35262	✓	09-35363
C07-1566	✓	09-35280		
C07-1567	✓	09-35282	✓	09-35375
C07-1568	✓	09-35285		
C07-1569	✓	09-35288		
C07-1570	✓	09-35290	✓	09-35381
C07-1571	✓	09-35292	✓	09-35364
C07-1572	✓	09-35317	✓	09-35365
C07-1573	✓	09-35320	✓	09-35366
C07-1575	✓	09-35302		
C07-1576	✓	09-35286	✓	09-35367
C07-1577	✓	09-35289		
C07-1578	✓	09-35293		
C07-1579	✓	09-35312		
C07-1580	✓	09-35315		
C07-1581	✓	09-35316		
C07-1582	✓	09-35306		
C07-1583	✓	09-35308		
C07-1584	✓	09-35310	✓	09-35368
C07-1585	✓	09-35307		
C07-1587	✓	09-35309	✓	09-35369

case as the lead/master case upon consolidation.

Case Name
Simmonds v. Morgan Stanley & Co. Incorporated, et al.
Simmonds v. Morgan Stanley & Co. Incorporated, et al.
Simmonds v. Morgan Stanley & Co. Incorporated, et al.
Simmonds v. Goldman Sachs & Co., et al.
Simmonds v. Goldman Sachs & Co., et al.
Simmonds v. Goldman Sachs & Co., et al.
Simmonds v. Goldman Sachs & Co., et al.
Simmonds v. Morgan Stanley & Co. Incorporated, et al.
Simmonds v. Morgan Stanley & Co. Incorporated, et al.
Simmonds v. Credit Suisse Securities (USA) LLC, et al.
Simmonds v. Goldman Sachs & Co., et al.
Simmonds v. Morgan Stanley & Co. Incorporated, et al.
Simmonds v. Goldman Sachs & Co., et al.
Simmonds v. Morgan Stanley & Co. Incorporated, et al.
Simmonds v. Goldman Sachs & Co., et al.
Simmonds v. Goldman Sachs & Co., et al.
Simmonds v. Morgan Stanley & Co. Incorporated, et al.
Simmonds v. Goldman Sachs & Co., et al.
Simmonds v. Morgan Stanley & Co. Incorporated, et al.
Simmonds v. Bank of America Corporation, et al.
Simmonds v. Goldman Sachs & Co., et al.
Simmonds v. Morgan Stanley & Co. Incorporated, et al.
Simmonds v. Goldman Sachs & Co., et al.
Simmonds v. Credit Suisse Securities (USA) LLC, et al.
Simmonds v. Bank of America Corporation, et al.
Simmonds v. Morgan Stanley & Co. Incorporated, et al.
Simmonds v. Bank of America Corporation, et al.
Simmonds v. Morgan Stanley & Co. Incorporated, et al.
Simmonds v. Bank of America Corporation, et al.

District Court Case No.	Appeal	9th Cir. Appeal No.	Cross-Appeal	9th Cir. Cross-Appeal No.
C07-1588	✓	09-35313	✓	09-35370
C07-1589	✓	09-35314	✓	09-35371
C07-1590	✓	09-35297	✓	09-35373
C07-1593	✓	09-35300		
C07-1594	✓	09-35301	✓	09-35374
C07-1595	✓	09-35303	✓	09-35391
C07-1597	✓	09-35318	✓	09-35393
C07-1598	✓	09-35321	✓	09-35397
C07-1605	✓	09-35333	✓	09-35380
C07-1623	✓	09-35334	✓	09-35383
C07-1624	✓	09-35339	✓	09-35395
C07-1626	✓	09-35344		
C07-1627	✓	09-35355		
C07-1628	✓	09-35357		
C07-1629	✓	09-35358	✓	09-35390
C07-1630	✓	09-35325		
C07-1631	✓	09-35323	✓	09-35404
C04-1632	✓	09-35322		
C07-1633	✓	09-35326	✓	09-35405
C07-1634	✓	09-35328		
C07-1635	✓	09-35331		
C07-1636	✓	09-35337		
C07-1637	✓	09-35335	✓	09-35377
C07-1638	✓	09-35324		
C07-1652	✓	09-35327	✓	09-35382
C07-1653	✓	09-35352	✓	09-35384
C07-1654	✓	09-35348	✓	09-35387
C07-1655	✓	09-35347	✓	09-35394
C07-1666	✓	09-35346	✓	09-35398

Case Name
Simmonds v. Bank of America Corporation, et al.
Simmonds v. Bank of America Corporation, et al.
Simmonds v. Credit Suisse Securities (USA) LLC, et al.
Simmonds v. J.P. Morgan Securities Inc., et al.

District Court Case No.	Appeal	9th Cir. Appeal No.	Cross-Appeal	9th Cir. Cross-Appeal No.
C07-1667	✓	09-35345	✓	09-35399
C07-1668	✓	09-35349		
C07-1669	✓	09-35350	✓	09-35400
C07-1670	✓	09-35351		

APPENDIX D

Blank Section 16(a) Report Form

[See foldout, next 2 pages]

FORM 4

☐ Check this box if no longer subject to Section 16. Form 4 or Form 5 obligations may continue. *See* Instruction 1(b).

(Print or Type Responses)

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

STATEMENT OF CHANGES IN BENEFICIAL OWNERSHIP

Filed pursuant to Section 16(a) of the Securities Exchange Act of 1934, Section 17(a) of the Public Utility Holding Company Act of 1935 or Section 30(h) of the Investment Company Act of 1940

OMB APPROVAL	
OMB Number:	3235-0287
Expires:	November 30, 2011
Estimated average burden hours per response	0.5

1. Name and Address of Reporting Person*	2. Issuer Name and Ticker or Trading Symbol	5. Relationship of Reporting Person(s) to Issuer (Check all applicable)
(Last) (First) (Middle)	3. Date of Earliest Transaction Required to be Reported (Month/Day/Year)	4. If Amendment, Date Original Filed(Month/Day/Year)
(Street)		6. Individual or Joint/Group Filing (Check Applicable Line)
(City) (State) (Zip)		

_____ Director _____ 10% Owner
_____ Officer (give title below) _____ Other (specify below)

_____

__ Form filed by One Reporting Person
__ Form filed by More than One Reporting Person

Table I — Non-Derivative Securities Acquired, Disposed of, or Beneficially Owned

1. Title of Security (Instr. 3)	2. Transaction Date (Month/Day/Year)	2A. Deemed Execution Date, if any (Month/Day/Year)	3. Transaction Code (Instr. 8)		4. Securities Acquired (A) or Disposed of (D) (Instr. 3, 4 and 5)			5. Amount of Securities Beneficially Owned Following Reported Transaction (s) (Instr. 3 and 4)	6. Ownership Form: Direct (D) or Indirect (I) (Instr. 4)	7. Nature of Indirect Beneficial Ownership (Instr. 4)
			Code	V	Amount	(A) or (D)	Price			

Reminder: Report on a separate line for each class of securities beneficially owned directly or indirectly.

* If the form is filed by more than one reporting person, *see* Instruction 4(b)(v).

Potential persons who are to respond to the collection of information contained in this form are not required to respond unless the form displays a currently valid OMB control number.

FORM 4 (continued) **Table II — Derivative Securities Acquired, Disposed of, or Beneficially Owned**
(*e.g.*, puts, calls, warrants, options, convertible securities)

1. Title of Derivative Security (Instr. 3)	2. Conversion or Exercise Price of Derivative Security	3. Transaction Date (Month/Day/Year)	3A. Deemed Execution Date, if any (Month/Day/Year)	4. Transaction Code (Instr. 8)		5. Number of Derivative Securities Acquired (A) or Disposed of (D) (Instr. 3, 4, and 5)		6. Date Exercisable and Expiration Date (Month/Day/Year)		7. Title and Amount of Underlying Securities (Instr. 3 and 4)		8. Price of Derivative Security (Instr. 5)	9. Number of derivative Securities Beneficially Owned following Reported Transaction(s)(Instr. 4)	10. Ownership Form of Derivative Security: Direct (D) or Indirect (I) (Instr. 4)	11. Nature of Indirect Beneficial Ownership (Instr. 4)
				Code	V	(A)	(D)	Date Exercisable	Expiration Date	Title	Amount or Number of Shares				

Explanation of Responses:

** Intentional misstatements or omissions of facts constitute Federal Criminal Violations. *See* 18 U.S.C. 1001 and 15 U.S.C. 78ff(a)

**Signature of Reporting Person

Date

Note: File three copies of this Form, one of which must be manually signed. If space is insufficient, *see* Instruction 6 for procedure.

Potential persons who are to respond to the collection of information contained in this form are not required to respond unless the form displays a currently valid OMB Number.

APPENDIX E

GORDON TILDEN THOMAS & CORDELL LLP
ATTORNEYS AT LAW

1001 FOURTH AVENUE, SUITE 4000 ·
SEATTLE, WASHINGTON 98154-1007
TELEPHONE: (206) 467-6477 · FACSIMILE: (206) 467-6292
EMAIL: JTHOMAS@GORDONTILDEN.COM

July 31, 2007

Via Facsimile and U.S. Mail

Onvia, Inc.
1260 Mercer Street
Seattle, WA 98109

Re: Vanessa Simmonds Demand on Board of Directors
16(b) Claim Against IPO Underwriters, Officers, Directors & Principal Shareholders

To: The Board of Directors of Onvia, Inc.

On behalf of Onvia ("the Company") shareholder Vanessa Simmonds, we demand that the board of directors prosecute a claim against the Company's IPO underwriters, in addition to certain of its officers, directors and principal shareholders, as identified in the IPO prospectus, for violations of § 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b).

Pursuant to the statute, a cause of action will vest in Ms. Simmonds if the Company does not initiate an action against these entities and individuals within sixty days from the date hereof, or if the Company, having initiated an action, fails to diligently prosecute the claim against them.

As of March 2, 2000, the entities and individuals referenced above had coordinated their efforts for the purpose of acquiring, holding, and/or disposing of securities of the Company. The combined number of Company shares beneficially owned by these entities and individuals exceeded ten percent of the Company's outstanding common stock at all times from the date of the Company's IPO on March 2, 2000, through March 1, 2001 ("the Relevant Period"). As a result, throughout the Relevant Period, these entities and individuals constituted a group pursuant to Exchange Act § 13(d), and Rule 13d-5 thereunder, that beneficially owned in excess of ten percent of the Company's outstanding common stock. The group and its members were thereby subject to the reporting requirements of § 16(a) and the short-swing trading prohibition of § 16(b).

Notwithstanding the short-swing trading prohibition of § 16(b), the group, through its members, engaged in purchases and sales of Company shares within periods of less than six months during the Relevant Period. Additionally, despite the reporting requirements of § 16(a), neither the group nor its members filed § 16(a) reports for these purchase and sale transactions. The group members should therefore be compelled to disgorge the profits they made through purchases and sales of Company stock during the Relevant Period.

Please let us know, within 60 days of the date of this letter, whether the Company intends to pursue the entities and individuals referenced above for the recovery of § 16(b) profits. Naturally, an earlier response would be greatly appreciated, but, to be clear, you are entitled to the full 60 days under the statute.

Very truly yours,

/s/ Jeffrey M. Thomas

Jeffrey M. Thomas

JMT:jl

APPENDIX F

GORDON TILDEN THOMAS & CORDELL LLP
ATTORNEYS AT LAW

1001 FOURTH AVENUE, SUITE 4000
SEATTLE, WASHINGTON 98154-1007
TELEPHONE: (206) 467-6477 · FACSIMILE: (206) 467-6292
EMAIL: JTHOMAS@GORDONTILDEN.COM

August 15, 2007

VIA FACSIMILE AND U.S. MAIL

So Young Kwon
General Counsel
Onvia, Inc.
1260 Mercer Street
Seattle, WA 98109

Re: Vanessa Simmonds' Demand on Onvia, Inc.'s Board of Directors

Dear Mr. Kwon:

Thank you for your letter dated August 14, 2007, regarding the July 31, 2007 Section 16(b) statutory demand of Vanessa Simmonds on Onvia, Inc.

As an initial matter, we believe the factual information set forth in those letters provides you and your client with sufficient information to evaluate the demand. With that said, we offer the following.

First, the underwriters, individuals and entities which we believe "coordinated their efforts for the purpose of acquiring, holding and/or disposing of the securities of the Company" are the lead underwriters, officers, directors and principal shareholders identified in the Company's IPO prospectus.

Second, as clearly set forth in Ms. Simmonds' July 31, 2007 demand, the dates of the short-swing trade transactions occurred within periods of less than six months between March 2, 2000 and March 1, 2001 – referred to in the demand letter as "the Relevant Period."

Third, the challenged transactions involve the activities of the lead underwriters, the other IPO underwriters, and the officers, directors and principal shareholders of the Company, as identified in the IPO prospectus, related to improper IPO allocation (so-called "laddering" and "spinning") and research and stock rating activities during the Relevant Period. As we are sure you are aware, information regarding these activities is readily available at court, law firm and SEC websites.

Fourth, at this time, we expect only the lead underwriters to be named as defendants, but reserve the right to name as defendants other members of the group identified above.

Beyond the foregoing, your letter seeks our internal legal analysis of various aspects of Exchange Act Rules 13d-3(d)(4) and 16a-7, and Section 16(b), itself. This request goes beyond what is necessary for us to provide under the statutory demand requirement of Section 16(b).

Finally, Ms. Simmonds is, in fact, a shareholder of Onvia, Inc., which is the only standing requirement under § 16(b).

Very truly yours,

/s/ Jeffrey M. Thomas

Jeffrey M. Thomas

JMT:jl

APPENDIX G

Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C07-1549 JLR

[Filed February 25, 2008]

VANESSA SIMMONDS,

Plaintiff,

v.

CREDIT SUISSE SECURITIES (USA) LLC, a Delaware limited liability company,

J.P. MORGAN SECURITIES INC., a Delaware corporation,

BANK OF AMERICA CORPORATION, a Delaware corporation,

and

ROBERTSON STEPHENS, INC., a Massachusetts corporation,

Defendants,

and)
)
ONVIA, INC., a Delaware Corporation,)
)
Nominal Defendant.)
_____)

FIRST AMENDED COMPLAINT
FOR RECOVERY OF SHORT-
SWING PROFITS UNDER
SECTION 16(b) OF THE
SECURITIES EXCHANGE ACT OF 1934

JURY DEMAND

I. IDENTIFICATION OF PARTIES

1. ***Plaintiff Simmonds.*** Plaintiff Vanessa Simmonds is a resident of King County, Washington. She is a shareholder of Onvia, Inc.

2. ***Defendant Credit Suisse.*** Defendant Credit Suisse Securities (USA) LLC ("Credit Suisse") is a Delaware limited liability company headquartered in New York, New York. The conduct of Credit Suisse as alleged herein was performed by Credit Suisse under its former name, Credit Suisse First Boston. Credit Suisse transacts business in the Western District of Washington.

3. ***Defendant J.P. Morgan.*** Defendant J.P. Morgan Securities Inc. ("J.P. Morgan") is a Delaware corporation headquartered in New York, New York. J.P. Morgan is successor-in-interest to Hambrecht & Quist, and was formerly known as Chase Securities, Inc., which used the trade name Chase H&Q

(collectively "Chase H&Q"). J.P. Morgan transacts business in the Western District of Washington.

4. ***Defendant Bank of America.*** Bank of America Corporation ("Bank of America") is a Delaware corporation headquartered in Charlotte, North Carolina. At all times relevant hereto, FleetBoston Robertson Stephens Inc. ("FBRS") was a wholly owned and controlled subsidiary of FleetBoston Financial Corporation ("FleetBoston"), a financial holding company. The financial operations of FBRS were, for financial reporting and other purposes, consolidated with the financial operations of FleetBoston and its other subsidiaries. Moreover, FleetBoston had actual authority over, and control of, the financial operations of FBRS and its conduct as alleged herein, and directly and substantially benefited therefrom. FleetBoston was a "controlling person" under Section 20(a) of the Securities Exchange Act of 1934 (15 U.S.C. § 78t), and was liable for violations of the Securities Exchange Act of 1934 on the part of FBRS. Thereafter, Bank of America became successor-in-interest to FleetBoston. As successor-in-interest to FleetBoston, Bank of America assumed the liabilities of FleetBoston, including liability for the violations by FBRS of Section 16(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78p(b) ("Section 16(b)") as alleged herein. Bank of America transacts business in the Western District of Washington.

5. ***Defendant Robertson Stephens.*** Robertson Stephens, Inc. ("Robertson Stephens") is a Massachusetts corporation, which was formerly known as FBRS. At all times relevant hereto, FBRS was headquartered in San Francisco, California, and transacted business in the Western District of

Washington. Roberson Stephens has joint and several liability with Bank of America for the Section 16(b) violations of FBRS as alleged herein.

6. ***Nominal Defendant Onvia.*** Nominal defendant Onvia, Inc, formerly known as Onvia.com, Inc., (collectively "Onvia"), is a Delaware corporation headquartered in Seattle, Washington, and is the issuer in this action brought under Section 16(b).

II. JURISDICTION AND VENUE

7. ***Jurisdiction.*** Jurisdiction in this Court arises under Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa.

8. ***Venue.*** Venue is proper in this Court under Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, because, *inter alia*, defendants Credit Suisse, J.P. Morgan and Bank of America transact business in this district.

III. STATUTORY DEMAND AND VESTING OF SECTION 16(b) CLAIMS

9. ***Statutory Demand.*** By letter dated July 31, 2007, which was faxed and mailed to the Onvia board of directors on that date, Ms. Simmonds, in her capacity as a shareholder of Onvia, made a 60-day demand on Onvia pursuant to Section 16(b).

10. ***Failure to Comply with Demand.*** More than 60 days have elapsed, and Onvia has failed to comply with Ms. Simmonds' Section 16(b) demand.

11. ***Vesting of Claims in Plaintiff.*** As a result of Onvia's failure to comply with Ms. Simmonds' demand, all rights to maintain this action have vested fully in Ms. Simmonds pursuant to Section 16(b). Onvia is named herein only as a nominal party.

IV. FACTUAL ALLEGATIONS

12. ***Lead Underwriters on Onvia IPO.*** Prior to December 21, 1999, the date on which Onvia filed its initial registration statement/prospectus with the Securities and Exchange Commission ("SEC"), Onvia retained Credit Suisse, Hambrecht & Quist and FBRS to serve as lead underwriters on the Initial Public Offering ("IPO") of Onvia common stock. Onvia filed its final prospectus with the SEC on March 1, 2000, and identified Credit Suisse, Chase H&Q and FBRS as lead underwriters on its IPO.

13. ***Credit Suisse, Chase H&Q and FBRS Create Opportunity to Profit from "Hot" Onvia IPO.*** Based on their assessment of Onvia as a potentially "hot" IPO, *i.e.*, one in which there likely would be substantial investor demand for shares of Onvia stock in both the IPO allocation and aftermarket, Credit Suisse, Chase H&Q and FBRS created the opportunity for themselves to directly and indirectly profit or share in any profits derived from transactions in Onvia stock.

14. ***Lack of Good Faith in IPO Underwriting Activities.***

(a) ***Scheme to Share in Customer Profits.*** Credit Suisse, Chase H&Q and FBRS, directly and indirectly, through contracts, arrangements,

understandings, relationships or otherwise, created the opportunity for themselves to directly and indirectly profit or share in any profits derived from the transactions of their customers in Onvia stock. This conduct violated NASD Conduct Rule 2330(f), which prohibited Credit Suisse, Chase H&Q and FBRS from sharing, directly or indirectly, in the profits or losses of their customers. Based on this violation, Credit Suisse, Chase H&Q and FBRS lacked good faith in connection with their IPO underwriting and distribution activities involving Onvia stock.

(b) ***Laddering Activities.*** Credit Suisse, Chase H&Q and FBRS, in conjunction with the other IPO underwriters and with the objective of inflating the aftermarket price of Onvia stock, secretly required customers, in return for allocations of Onvia IPO shares, to purchase additional shares of Onvia stock in the aftermarket at progressively higher prices. This practice is referred to as "laddering," and violates Rule 101 of Regulation M under the Securities Exchange Act of 1934. Based on this violation, Credit Suisse, Chase H&Q, FBRS, and the other IPO underwriters lacked good faith in connection with their IPO underwriting and distribution activities involving Onvia stock.

15. ***Common Objective to Inflate Aftermarket Price of Onvia Stock.*** Credit Suisse, Chase H&Q, FBRS, and Onvia officers, directors and principal shareholders coordinated their efforts towards inflating the aftermarket price of Onvia stock to a level sufficiently above the IPO price to enable them to directly and indirectly reap substantial profits from the sale of Onvia stock. Through their concerted activity, Credit Suisse, Chase H&Q, FBRS, and the

Onvia officers, directors and principal shareholders misused, or otherwise took unfair advantage of, the control and influence they had over the internal corporate affairs of Onvia.

16. ***Lock-Up Agreements.*** Onvia's directors and officers, as well as other stock and option holders, as identified in the IPO prospectus, entered into "lock-up agreements" with Credit Suisse and the other IPO underwriters. The lock-up agreements were for the specific purpose of collectively holding – and refraining from selling – shares of Onvia stock, and furthered the overall common objective. These lock-up agreements provided that, subject to limited exceptions, the stockholder could not offer, sell, contract to sell, pledge or otherwise dispose of any Onvia common stock or securities for a period of 180 days after the effective date of the IPO. Credit Suisse, however, had the right, in its sole discretion, at any time without notice, to release all or any portion of the shares subject to lock-up agreements. As a result, Credit Suisse, for itself and as representative of the other IPO underwriters, directly or indirectly shared control over the disposition of approximately 50 million shares of Onvia common stock at the time of the Onvia IPO.

17. ***Underpricing of IPO.*** In furtherance of this common objective, Credit Suisse, Chase H&Q, FBRS, and Onvia officers, directors and principal shareholders agreed to the pricing of Onvia's IPO shares at a small fraction of what they knew to be the likely aftermarket price range of Onvia stock based on clear indications of IPO and aftermarket demand. In doing so, Credit Suisse, Chase H&Q, FBRS, and Onvia officers, directors and principal shareholders coordinated their control and influence over the

corporate affairs of Onvia in a manner that was contrary to the interests of Onvia and its other shareholders. The Onvia officers, directors and principal shareholders did so with the expectation of deriving personal financial benefits, after the expiration or earlier release of the lock-up agreements, from their sale of Onvia stock into a market inflated through the activities of Credit Suisse, Chase H&Q, FBRS, and other IPO underwriters. For their part, Credit Suisse, Chase H&Q and FBRS engaged in an IPO allocation scheme involving laddering and improper research-related activities that were designed to inflate the market price of Onvia stock. They did so with the expectation of creating the opportunity to directly and indirectly profit or share in any profits derived from transactions in Onvia stock.

18. ***IPO Shares Priced at $21, Trade in Aftermarket at $65.*** The 9.2 million shares of Onvia stock sold in connection with its IPO raised $179.7 million for Onvia – less than one-third of what buyers paid for Onvia shares in the immediate aftermarket.

19. ***10% Group Status.*** Credit Suisse, Chase H&Q, FBRS, the other IPO underwriters, and the Onvia officers, directors and principal shareholders beneficially owned Onvia stock, which was registered pursuant to Section 12 of the Securities Exchange Act of 1934, when they engaged in a concerted course of conduct, the purpose of which included: (i) acquiring Onvia stock, including acquiring Onvia stock at progressively higher prices in order to drive up its market price; (ii) holding Onvia stock, including holding Onvia stock pursuant to the lock-up agreements in order to limit the supply of shares available for sale in the market; and (iii) disposing of

Onvia stock, including directly or indirectly directing the disposition of Onvia stock so as to share in the profits gained in the aftermarket following the IPO. This concerted activity was designed to further the common objective of creating the opportunity for themselves to profit by selling Onvia stock at the resulting inflated prices. They thereby constituted a group (the "Group") pursuant to Section 13(d) of the Securities Exchange Act of 1934 and Rule 13d-5 promulgated thereunder. Collectively, the Group beneficially owned in excess of 10 percent of Onvia's outstanding common stock from the Group's inception prior to Onvia's IPO on or about March 1, 2000, through at least February 28, 2001 (the "Relevant Period"). As a result, Credit Suisse, Chase H&Q, FBRS, and the other members of the Group were subject to the reporting requirements of Section 16(a) and the short-swing trading prohibition of Section 16(b) throughout the Relevant Period.

20. ***Short-Swing Transactions in Onvia Stock.*** Throughout the Relevant Period and within periods of less than six months, Credit Suisse, Chase H&Q and FBRS profited from purchases and sales, or sales and purchases, of Onvia stock of which they were beneficial owners for purposes of Section 16(b) ("Short-Swing Transactions"). Credit Suisse, Chase H&Q and FBRS directly or indirectly had or shared a direct or indirect pecuniary interest in Onvia stock in various ways, including, but not limited to, the following: (i) by sharing in the profits of customers to whom they made IPO allocations of Onvia stock; (ii) by allocating shares of Onvia stock to executives and other high-level insiders of other companies, both private and public, from which Credit Suisse, Chase H&Q and FBRS expected to receive new or additional investment

banking business in return (a practice referred to by the SEC as "spinning"); and (iii) by creating the opportunity for other members of the Group to derive personal financial benefits from the sale of Onvia stock into an inflated market, in an effort by Credit Suisse, Chase H&Q and FBRS to obtain future investment banking business from Onvia.

21. ***Failure to Comply with Section 16(a) Reporting Requirements.*** Credit Suisse, Chase H&Q and FBRS failed to report the Short-Swing Transactions as required under of Section 16(a) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78p(a), thereby tolling the two-year statute of limitations set forth in Section 16(b). Because Credit Suisse, Chase H&Q and FBRS failed to report these Short-Swing Transactions as required by Section 16(a), the precise dates of prohibited Short-Swing Transactions made by them, any member of the Group, or others, of Onvia stock beneficially owned by Credit Suisse, Chase H&Q and/or FBRS, are unknown to Ms. Simmonds at this time.

V. CAUSE OF ACTION

Short-Swing Profits Generated In Violation of Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b).

22. ***Incorporation.*** The allegations in the preceding paragraphs are incorporated as if fully set forth herein.

23. ***Profits from Short-Swing Transactions.*** Credit Suisse, Chase H&Q and FBRS profited from Short-Swing Transactions in Onvia stock by engaging

in such transactions within periods of less than six month during the Relevant Period. Credit Suisse, Chase H&Q and FBRS thereby violated Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b).

24. ***Remedy.*** Credit Suisse, J.P. Morgan, as successor-in-interest to Chase H&Q, Bank of America, as successor-in-interest to FBRS, and Robertson Stephens must disgorge all profits, with interest, from their respective Short-Swing Transactions in Onvia stock, in amounts to be proven at trial.

VI. REQUESTED RELIEF

Plaintiff respectfully requests the following relief:

(a) Judgment against Credit Suisse, J.P. Morgan, and jointly and severally against Bank of America and Robertson Stephens, for all profits from Short-Swing Transactions prohibited by Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78p(b), in amounts to be proven at trial;

(b) An award of pre-judgment and post-judgment interest on all amounts awarded or restitution or disgorgement ordered;

(c) An award of costs and attorneys' fees against Credit Suisse, J.P. Morgan, and jointly and severally against Bank of America and Robertson Stephens; and

(d) Such other and further relief that this Court deems just and equitable.

DATED this 25th day of February, 2008.

GORDON TILDEN THOMAS & CORDELL LLP

By /s/ Jeffrey M. Thomas
Jeffrey I. Tilden, WSBA #12219
Jeffrey M. Thomas, WSBA #21175
Mark A. Wilner, WSBA #31550

KELLER ROHRBACK L.L.P.

By /s/ Ian S. Birk
William C. Smart, WSBA #8192
Ian S. Birk, WSBA #31431

Attorneys for Plaintiff

[Certificate of Service omitted in printing of this Appendix]

No. 10-1218

Supreme Court, U.S.
FILED
MAY 26 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

VANESSA SIMMONDS,

Petitioner,

v.

CREDIT SUISSE SECURITIES (USA) LLC, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOVING ISSUER RESPONDENTS' BRIEF IN OPPOSITION

DAVID H. KISTENBROKER
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Liaison Counsel for Moving Issuer Respondents

May 26, 2011

[Additional Counsel Listed on Signature Page]

236181

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit properly held that Petitioner's statutorily mandated pre-suit demand letters were inadequate given that the letters failed to identify the wrongdoing allegedly perpetrated and the legal action Petitioner wanted the Moving Issuers' boards to take on the respective corporation's behalf.[1]

2. Whether the Ninth Circuit properly rejected Petitioner's argument that demand should be excused as futile given that a shareholder may not invoke the demand futility exception after submitting a demand to the board.

3. Whether the Ninth Circuit properly converted dismissal of Petitioner's claims from without prejudice to with prejudice given that the actual pre-suit demand letters were considered by the court and found to be inadequate, and thus any amendment would be futile.

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, the undersigned counsel submits the Corporate Disclosure Statement for the Moving Issuer Respondents set forth below:

Akamai Technologies, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Ariba, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

AsiaInfo-Linkage, Inc., formerly known as AsiaInfo Holdings, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

Aspect Medical Systems, Inc. is a wholly owned subsidiary of Covidien PLC, a publicly held company.

Audible, Inc. is a wholly owned subsidiary of Amazon.com, Inc., a publicly held company.

Capstone Turbine Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

CoSine Communications, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

L-1 Secure Credentialing, Inc., formerly known as Digimarc Corporation, is a wholly owned subsidiary of L-1 Identity Solutions Operating Company, which is a

subsidiary of L-1 Identity Solutions, Inc., a publicly traded company ("L-1"). On September 20, 2010, L-1 publicly announced it had entered into an agreement under which Safran, a French company, will acquire L-1 following the sale of L-1's government/intelligence services business to BAE Systems. In February 2011, L-1 consummated the sale of the stock and membership interests of the entities comprising the L-1 Intel Business to BAE Systems. The acquisition by Safran is subject to a number of conditions, including, but not limited to, prior review by the U.S. Committee on Foreign Investment in the United States (CFIUS). In connection with the pending acquisition of L-1 by Safran SA, the CFIUS informed L-1 on May 4, 2011 that it had accepted the refiled joint notification which provides additional time to negotiate the terms of a definitive mitigation agreement. This acceptance commenced a new 30-day review period scheduled to expire on June 2, 2011. L-1 expects the parties to work diligently in an effort to finalize the agreement as quickly as practicable; however, there can be no assurance that a definitive mitigation agreement will be executed. L-1 expects the closing of the acquisition to occur within 30 to 40 days from the May 4, 2011 acceptance by CFIUS of the refiling of the joint notification. The closing is subject to the timing and successful completion of the CFIUS process and assumes satisfaction or waiver of all other applicable conditions.

Finisar Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

InterNAP Network Services Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

Intersil Corporation has no parent corporation. There are only two publicly traded companies that own 10% or more of Intersil Corporation's common stock, namely, T. Rowe Price Associates, Inc. and FMR L.L.C.

Martha Stewart Living Omnimedia, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Maxygen, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

NaviSite, Inc. was acquired by Time Warner Cable, Inc. on April 21, 2011. Time Warner Cable, Inc., a publicly traded company, is the sole shareholder of NaviSite, Inc.

On February 22, 2011, Occam Networks, Inc. was acquired by Calix, Inc., a publicly traded Delaware corporation. In the course of the acquisition (a "reverse-triangular merger"), Occam Networks, Inc. was merged into Occam Networks, LLC, with Occam Networks, LLC being the surviving entity. Occam Networks, LLC is a wholly owned subsidiary of Calix, Inc.

Onvia, Inc. has no parent corporation and no publicly held corporation currently owns 10% or more of its stock.

Openwave Systems, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Oplink Communications, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Packeteer, Inc. is a wholly owned subsidiary of Blue Coat Systems, Inc., a publicly held company.

Perot Systems Corporation is a wholly owned subsidiary of Dell, Inc., a publicly held company.

Priceline.com Incorporated has no parent corporation and no publicly held company owns 10% or more of its stock.

Red Hat, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Saba Software, Inc. has no parent corporation. The only publicly traded corporation that owns 10% or more of Saba Software, Inc.'s common stock is T. Rowe Price Associates, Inc.

Selectica, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Silicon Laboratories, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Soapstone Networks Inc., formerly known as Avici Systems, Inc., has no parent corporation and no publicly held corporation owns 10% or more of its stock. Soapstone Networks Inc. has been dissolved pursuant to Section 275 of the General Corporation Law of the State of Delaware by the filing of a Certificate of Dissolution with the Secretary of State of Delaware. The Certificate of Dissolution became effective July 31, 2009, and the period for winding up the affairs of Soapstone Networks Inc. thereupon began.

Sonus Networks, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Sycamore Networks, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

TheStreet.com, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

TiVo Inc. has no parent corporation. The only publicly traded corporation that owns 10% or more of TiVo Inc.'s common stock is Blackrock, Inc.

On July 21, 2009, Open Text Corporation, a publicly traded Canadian corporation, acquired through an indirect wholly owned subsidiary all of the issued and outstanding common shares of Vignette Corporation.

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INTRODUCTION

There is no conflict among federal courts on any of the questions presented by Petitioner. Indeed, no other circuit court has addressed the substantive requirements of a pre-suit demand under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b) ("Section 16(b)"). The Ninth Circuit faithfully applied this Court's instruction to determine "the contours of the demand requirement" by applying the law of the Moving Issuers' state of incorporation, here Delaware. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90 (1991). And, the Ninth Circuit's application of Delaware law to evaluate the content of Petitioner's Section 16(b) demand letters was plainly correct. Noting that Petitioner's demand letters make no reference to the transactions on which her complaints are based, Appendix to the Petition ("Appendix" or "Pet. App.") at 61a, the Ninth Circuit held that the demand letters are inadequate because they fail to identify the wrongdoing allegedly perpetrated and the legal action she wanted the boards to take. *Id.* at 59a. In these circumstances, there is no issue worthy of this Court's review.

Petitioner does not challenge the Ninth Circuit's conclusion that her demand letters are inadequate under Delaware law and explicitly acknowledges that "[n]o decision from this Court, or any circuit court before the Ninth Circuit decision, has ever addressed the requirements of a Section 16(b) pre-suit demand." Pet. at 17. Petitioner nevertheless hopes to obtain the Court's review by creating a conflict where none exists. In fact, her entire Petition is based on the false premise that the Ninth Circuit's decision "subjects Section 16(b) claims to

the procedural dictates of Rule 23.1" and thus conflicts with decisions of other circuit courts. *Id.* at 16. Contrary to Petitioner's assertion, the Ninth Circuit specifically refrained from deciding whether Rule 23.1 applies to Section 16(b) claims, because that issue was not relevant to its analysis. Pet. App. at 51a n.7. Petitioner's purported conflict is thus nonexistent and the Petition should be denied.

Petitioner also seeks review of the Ninth Circuit's rejection of her attempt to excuse the inadequate demand letters by arguing demand futility. Despite the unambiguous opinion of the Ninth Circuit, she again claims that the court erroneously "allowed Rule 23.1 to govern its analysis" and that this creates a circuit split worthy of review. Pet. at 28. As with the issue of adequacy of demand, Petitioner's attempt to obtain review based on this false conflict must be rejected.

Finally, Petitioner seeks review of the Ninth Circuit's decision to dismiss the cases involving the Moving Issuers with prejudice, rather than without prejudice. As the Ninth Circuit made clear, dismissal with prejudice is appropriate where amendment would be futile.

The Ninth Circuit's decision to affirm the district court's dismissal of Petitioner's complaints for failure to make an adequate demand was proper. And, Petitioner cannot show that the Ninth Circuit's decision regarding her demand letters is contrary to any prior decisions of this Court or those of any other circuit court. For these reasons and the reasons set forth below, the Petition should be denied.

COUNTER-STATEMENT OF THE CASE

I. THE POLICIES UNDERLYING SECTION 16(b)

Petitioner's complaints allege that the Underwriters[2] violated Section 16(b) by engaging in prohibited "short-swing" transactions in connection with the Initial Public Offerings (IPOs) of the fifty-four Issuers between 1999 and 2000. *See* 15 U.S.C. § 78p(b).

Congress specifically included a demand requirement in Section 16(b) and provided a sixty-day period during which a corporation's board has the opportunity to investigate and initiate suit, if appropriate. *Id.* (Section 16(b) suit may be brought by shareholder only "if the issuer shall fail or refuse to bring such suit within sixty days after request"). The policy behind the demand requirement "'is to assure that the stockholder affords the corporation the opportunity to address an alleged wrong without litigation, to decide whether to invest the resources of the corporation in litigation, and to control any litigation which does occur.'" Pet. App. at 54a (quoting *Spiegel v. Buntrock*, 571 A.2d 767, 773 (Del. 1990)); *see also Henss v. Schneider*, 132 F. Supp. 60, 62 (S.D.N.Y. 1955) ("The sixty day [demand] provision [in Section 16(b)] was enacted for the benefit of the corporation and to afford it a reasonable opportunity to assert and prosecute its claim in its own name for the recovery of profits from the insider."); *Colan v. Monumental Corp.*, 524 F. Supp. 1023, 1027 (N.D. Ill. 1981) (Section 16(b)'s demand requirement allows a corporation "to address shareholder complaints prior to resorting to judicial intervention.") (citation omitted).

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2. "Underwriters" refers to the Underwriter Defendants listed in the Petition at iii.

Section 16(b) is designed to protect investors, the market, and issuers themselves from abuses by corporate insiders' speculative short-swing trading based on inside information. *See Kern Cnty. Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 594-95 (1973). Because Section 16(b) applies harshly to hold statutorily defined insiders strictly liable for short-swing profits, this Court has narrowly construed Section 16(b)'s reach. *Foremost-McKesson, Inc. v. Provident Sec. Co.*, 423 U.S. 232, 251-52 (1976) ("[Section 16(b)] imposes liability without fault within its narrowly drawn limits"). *See also Dreiling v. Am. Online Inc.*, 578 F.3d 995, 997, 1005 (9th Cir. 2009) (noting the "narrow interpretation generally given Section 16(b) by Congress and all judicial precedent thus far" and rejecting plaintiff's "novel theory of liability" which would impermissibly "expand Section 16(b) beyond its previously-established boundaries"). Section 16(b) "was not intended to remedy all wrongs" and "is simply not an antidote to all the ills that may plague the securities market." *Heublein, Inc. v. Gen. Cinema Corp.*, 722 F.2d 29, 31 (2d Cir. 1983).

II. BRIEF FACTUAL BACKGROUND

In July 2007 – eight years after the relevant IPOs described in the Petition – Petitioner sent so-called demand letters to the fifty-four Issuers' boards of directors. Pet. App. at 93a-94a. The nearly identical demand letters each describe the alleged wrongful acts and purported damages to be sought by the Issuers in a single paragraph:

> Notwithstanding the short-swing trading prohibition of Section 16, the group, through its members engaged in purchase and sales

> of company shares within periods of less than six months during [the one-year relevant period]. Additionally, despite the reporting requirements of Section 16(a), neither the group nor its members filed Section 16(a) reports for these purchase and sale transactions. The group members should therefore be compelled to disgorge the profits they made through the purchase and sale of Company Stock during [the one-year relevant period].

Id. at 97a. Of the fifty-four Issuers that received Petitioner's boilerplate demand letters, none brought suit. Pet. at 12.

In October 2007, Petitioner – who apparently acquired shares of the Issuers at the direction of her father, a securities attorney with experience in Section 16(b) litigation – filed fifty-four separate complaints alleging violations of Section 16(b). The complaints were "based on the same set of facts as presented in [*In re Initial Public Offering Securities Litigation*, No. 21 MC 92 (SAS) (S.D.N.Y.)]." Pet. App. at 85a; *see also id.* at 83a. In her complaints, Petitioner articulated a novel and complex theory of liability that bears no resemblance to the Section 16(b) claim contained in the demand letters. *See id.* at 61a. Specifically, Petitioner's complaints allege that the Underwriters violated Section 16(b) by engaging in the following alleged "Short-Swing Transactions": (1) sharing the profits of customers to whom they made IPO allocations; (2) allocating shares of the Issuers' stock to executives and other high-level insiders of other companies, from which the Underwriters expected to receive investment banking opportunities in return; and (3) creating opportunities for other members of the alleged group to profit from the sale of the Issuers' stock in return

for future banking opportunities. *Id.* at 45a-46a. None of these transactions are mentioned in the demand letters.

III. THE DISPOSITION BELOW

On July 25, 2008, the Moving Issuers jointly filed a motion to dismiss, arguing that Petitioner had failed to serve the Moving Issuers with adequate pre-suit demand letters and that her claims were time-barred. *Id.* at 46a-47a. The Underwriters filed a separate motion to dismiss, arguing that Petitioner's claims were time-barred, that her complaints failed to state a cause of action under Section 16(b), and that the Underwriters are protected by various exemptions from Section 16(b). *Id.* at 46a.

On March 12, 2009, the district court granted the Moving Issuers' Joint Motion to Dismiss, holding that Petitioner failed to serve adequate demand letters and thus lacked standing to pursue claims arising from the Moving Issuers' IPOs.[3] The district court correctly found that Petitioner's fifty-four nearly identical demand letters "do not describe the same alleged wrongdoing that she later describes in her complaints," which the court observed were based on a "complex and novel" theory of liability. *Id.* at 98a, 101a. Accordingly, the demand

3. The district court's opinion is reported at 602 F. Supp. 2d 1202, and reprinted in the Appendix at 79a-113a. The district court did not reach the Moving Issuers' argument that Petitioner's claims are barred by the two-year statute of limitations. The district court did, however, reach the limitations issue in ruling on the Underwriters' motion to dismiss, holding that the claims against the Underwriters based on the Non-Moving Issuers' IPOs are time-barred. *Id.* at 105a-111a.

letters "did not put the Issuer Defendants on notice that [Petitioner] was demanding that the corporation compel the Underwriter Defendants to disgorge profits they earned when customers to whom they allocated IPO shares sold such shares in the aftermarket." *Id.* at 98a. In short, "nothing in the demand letters sent to the Issuer Defendants, nor in any of the follow-up letters, explains [Petitioner's] multi-layered theory of recovery of profits from short-swing trades." *Id.* at 101a. The district court concluded that the claims were "premised upon mere suspicion," "based almost entirely on conjecture," and were not of the type that "would further the congressional intent of [Section 16(b)]." *Id.* at 98a n.13, 99a, 110a. The court also rejected Petitioner's attempt to excuse her inadequate demand letters by arguing demand futility. *Id.* at 102a-103a.

On appeal, the Ninth Circuit affirmed the district court's ruling that Petitioner's demand letters are insufficient because none of the transactions on which Petitioner bases her complaints are "referenced in any way" in her demand letters. *Id.* at 61a, 64a.[4] Specifically, Petitioner's "demand letters claimed that the Underwriters

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4. The Ninth Circuit's opinion, as amended by the order denying the petitions for rehearing en banc, is reported at __ F.3d __, 2011 WL 135693, and is reprinted in the Appendix at 1a-78a. The Ninth Circuit reversed the district court's holding that Petitioner's claims are barred by the applicable statute of limitations. On April 15, 2011, the Underwriters filed a petition for writ of certiorari with the Court on this issue in those cases involving the Non-Moving Issuers' IPOs (No. 10-1261). Because the Ninth Circuit did not reach the statute of limitations in the cases involving the Moving Issuers' IPOs, those cases are not part of Underwriters' petition.

directly bought and sold the Issuing Companies' shares, and accordingly requested that the Issuing Companies seek disgorgement of the Underwriters' trading profits," while her complaints seek the disgorgement of indirect profits that the Underwriters received from "their *customers'* purchases and sales of the Issuing Companies' shares." *Id.* at 60a-61a (emphasis in original). Simply put, "[t]he garden-variety Section 16(b) claim made out in these demand letters bears no resemblance to the elaborate scheme described in [Petitioner's] Complaints." *Id.* at 61a.

The Ninth Circuit, like the district court, also rejected Petitioner's argument that "the demand requirement should be excused as futile," ruling that "shareholders may not invoke the futility exception after submitting a demand to the board." *Id.* at 64a (citing *FLI Deep Marine LLC v. McKim*, C.A. No. 4138-VCN, 2009 WL 1204363, at *3 n.17 (Del. Ch. Apr. 21, 2009)). In concluding, the Ninth Circuit held that Petitioner "is barred from relitigating issues relating to the adequacy of the demand letters," which were "litigated fully on the merits," and instructed the district court to dismiss the cases involving the Moving Issuers' IPOs with prejudice. Pet. App. at 71a.

REASONS FOR DENYING THE PETITION

I. THE NINTH CIRCUIT'S DECISION REGARDING PETITIONER'S INADEQUATE DEMAND LETTERS WAS PROPER AND DOES NOT CONFLICT WITH ANY OTHER DECISION.

A. The Ninth Circuit Is the Only Circuit that Has Addressed the Substantive Requirements of a Section 16(b) Demand Letter.

There is no circuit split on any issue presented in the Petition, including the required contents of a Section 16(b) demand letter, thus the Petition should be denied. Petitioner concedes, as she must, that "[n]o decision from this Court, or any circuit court before the Ninth Circuit decision, has ever addressed the requirements of a Section 16(b) pre-suit demand when the insiders have failed to comply with Section 16(a)." Pet. at 17. In fact, no circuit court prior to the Ninth Circuit has ever addressed the requirements of a Section 16(b) demand letter in any context.[5] By definition, then, the Ninth Circuit's decision cannot conflict with the law of any other circuit.

Dissatisfied that both the Ninth Circuit and the district court found her demand letters inadequate, Petitioner now hopes to obtain this Court's review

5. Moving Issuers are aware of only one district court opinion (aside from the opinion below) that addresses the substantive requirements of a Section 16(b) demand letter. *See Dreiling v. Am. Express Travel Related Servs.*, 351 F. Supp. 2d 1077, 1085 (W.D. Wash. 2004) (applying law of state of incorporation to evaluate sufficiency of demand letter), *rev'd on other grounds*, 458 F.3d 942 (9th Cir. 2006).

by manufacturing a circuit split out of whole cloth. Specifically, Petitioner claims that "the Ninth Circuit decision subjects Section 16(b) to the procedural dictates of Rule 23.1" in contravention of decisions from other circuit courts which have held that Rule 23.1 does not apply to Section 16(b) claims. *Id.* at 16. Petitioner's assertion misrepresents the Ninth Circuit's holding, in which the court explicitly refrained from deciding whether Rule 23.1 applies to Section 16(b) actions. Pet. App. at 51a n.7. Rather, the Ninth Circuit relied on substantive state law to evaluate the sufficiency of Petitioner's demand letters. *Id.* at 51a-52a (citing *Kamen*, 500 U.S. at 108). Accordingly, Petitioner's cases – none of which address the sufficiency of a Section 16(b) demand or the propriety of looking to state law for the required substance of a Section 16(b) demand letter – in no way conflict with the Ninth Circuit's decision. *See* Section D, *infra*.

B. The Ninth Circuit's Application of *Kamen* Was Proper.

The Ninth Circuit appropriately followed the principles set forth in *Kamen*, 500 U.S. 90, in evaluating the substance of Petitioner's demand letters. In *Kamen*, the Court considered whether it "should fashion a federal common law rule obliging the representative shareholder in a derivative action founded on the Investment Company Act of 1940 to make a demand on the board of directors even when such a demand would be excused as futile under state law." *Id.* at 92 (citation omitted). In answering this question, the Court observed that although Rule 23.1 sets forth pleading requirements, it "does not *create* a demand requirement of any particular dimension." *Id.* at 96 (emphasis in original). Rather, "the function of the

demand doctrine in delimiting the respective powers of the individual shareholder and of the directors to control corporate litigation clearly is a matter of 'substance,' not 'procedure.'" *Id.* at 96-97. Thus, it was necessary to "identify the source and content of the substantive law that defines the demand requirement." *Id.* at 97.

Reaffirming the teaching from its earlier decision, *Burks v. Lasker*, 441 U.S. 471 (1979),[6] the Court explained: "[W]here a gap in the federal securities laws must be bridged by a rule that bears on the allocation of governing powers within the corporation, federal courts should incorporate *state* law into federal common law unless the particular state law is inconsistent with the policies underlying the federal statute." *Kamen*, 500 U.S. at 108 (emphasis in original). Applying this principle, the Court held that "the contours of the demand requirement," including the standards governing demand futility, must be determined by the law of the state of incorporation. *Id.* at 101.

As the Ninth Circuit held, this case fits squarely within the holding of *Kamen*. Section 16(b) requires a shareholder to make a demand on a corporation's board of directors and to wait sixty days before she is permitted to sue, 15 U.S.C. § 78p(b), but "does not set forth any

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6. In *Burks*, the Court stated that "'[c]orporations are creatures of state law,' and it is state law which is the font of corporate directors' powers." 441 U.S. at 478 (citation omitted). Federal legislation "is generally enacted against the background of existing state law; Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute." *Id.* (citations omitted).

additional details regarding the nature and scope of this statutory demand requirement." Pet. App. at 51a. In light of this silence, the Ninth Circuit turned to the law of Delaware – the state of incorporation for each Moving Issuer – to ascertain the substantive requirements for a pre-suit demand. *Id.* at 51a-52a (citing *Kamen*, 500 U.S. at 108).

Under Delaware law, a pre-suit demand letter must "'specifically state (i) the identity of the alleged wrongdoers, (ii) the wrongdoing they allegedly perpetrated and the resultant injury to the corporation, and (iii) the legal action the shareholder wants the board to take on the corporation's behalf.'"[7] Pet. App. at 55a (quoting *Yaw v. Talley*, Civ.A. No. 12882, 1994 WL 89019, at *7 (Del. Ch. Mar. 2, 1994). Applying this standard, the Ninth Circuit correctly held that Petitioner's demand letters were inadequate because they failed to identify "'the wrongdoing . . . allegedly perpetrated'" and "'the legal action the shareholder wants the board to take on the corporations' behalf.'" Pet. App. at 59a (quoting *Yaw*, 1994 WL 89019, at *7). Likewise, the follow-up letters that Petitioner sent to twenty-five of the Issuers "completely failed to provide sufficiently detailed information to permit the boards to conduct a good faith inquiry into the alleged wrongdoing." Pet. App. at 61a-62a.

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7. However, the Ninth Circuit explained that, in the Section 16(b) context, "a shareholder's demand need not identify any corporate injury in order to satisfy the demand requirement" because "this requirement 'frustrate[s] specific objectives' of Section 16(b) by adding an additional element to the Section 16(b) cause of action." Pet. App. at 60a n.18 (quoting *Kamen*, 500 U.S. at 98).

C. Petitioner's Arguments Regarding *Kamen* and Delaware's Pre-Suit Demand Standard Are Unavailing.

Petitioner does not challenge the Ninth Circuit's conclusion that her demand letters are insufficient under Delaware's pre-suit demand standard. Rather, Petitioner contends that the Ninth Circuit erred by following *Kamen* and incorporating the substantive demand requirements applied in traditional derivative actions because, she argues, "Rule 23.1 demands differ materially from Section 16(b) demands in at least two respects." Pet. at 18-19.

First, Petitioner claims that "in a Rule 23.1 suit, the pre-suit demand is meant to 'afford the directors an opportunity to exercise their reasonable business judgment,'" whereas in a Section 16(b) suit, the "business judgment of an issuer's board is irrelevant." *Id.* at 19 (citations omitted). Yet Petitioner blatantly ignores that the Ninth Circuit considered the differences between Section 16(b) cases and traditional derivative cases and also noted the similarities in the policies underlying the demand requirements. Pet. App. at 54a-56a.

The Ninth Circuit emphasized the primary policy underlying the pre-suit demand requirement: "'[T]o assure that the stockholder affords the corporation the *opportunity* to address an alleged wrong without litigation, to decide whether to invest the resources of the corporation in litigation, and to control any litigation which does occur.'" *Id.* at 54a (quoting *Spiegel*, 571 A.2d at 773 (emphasis added)). This policy is served by the demand requirement in both the Rule 23.1 and Section 16(b) contexts. *See supra* at 3-4 (citing *Henss*, 132 F. Supp. at 62; *Colan*, 524 F. Supp. at 1027).

The proceeding policy would be frustrated if, as here, a shareholder could file and control a Section 16(b) lawsuit after submitting a *pro forma* demand letter that makes no mention of the alleged short-swing transactions or legal theory she intends to pursue. *See* Pet. App. at 61a (wrongdoing and transactions alleged in Petitioner's complaints are not referenced in her demand letters); *see also id.* at 63a ("were we to adopt Simmonds's proposed approach, Delaware's demand standard would be eviscerated"). While the business judgment rule may not shield the board's refusal to act on an adequate Section 16(b) demand letter, the board must still be given the opportunity to investigate and pursue the claim in the first instance. *See Grossman v. Johnson*, 674 F.2d 115, 120 (1st Cir. 1982) ("If anything, that special demand provision [in Section 16(b)] indicates that Congress considered a demand essential for a shareholder suit even though Congress may have dispensed with other aspects of what is now Rule 23.1.").[8] Thus, Petitioner's argument provides no justification for this Court's review.

Second, Petitioner claims, for the first time, that *Kamen* was misapplied because Section 16(b) "states the demand requirement explicitly in the statute," and

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8. As explained by the Ninth Circuit, the "demand rule 'is not merely a technical or unimportant requirement,'" and is "particularly relevant in the Section 16(b) context." Pet. App. at 55a (quoting *Potter v. Hughes*, 546 F.3d 1051, 1058 (9th Cir. 2008)). "'Anecdotal evidence suggests that well over 90 percent of all Section 16(b) claims are settled privately without any lawsuit being filed,'" but this figure most certainly would be lower if boards were not afforded the opportunity to address allegations of short-swing trading. Pet. App. at 55a (quoting Peter Romeo & Alan Dye, *Section 16 Treatise and Reporting Guide* § 9.01 [7][c] (3d ed. 2008)).

thus there is no gap to bridge. Pet. at 20. Yet Petitioner acknowledges that "Section 16(b) does not set out any requirements for the demand itself." *Id.* at 4. In acknowledging the statute's silence, Petitioner advocates for deriving the substantive requirements for a pre-suit demand letter from a treatise's summary of what "usually will" be contained in a demand letter in a typical Section 16(b) case. *Id.* at 17 (citing Peter Romeo & Alan Dye, *Section 16 Treatise and Reporting Guide* § 9.02[4] (3d ed. 2008)). But Romeo & Dye does not even purport to set out the "requirements" for Section 16(b) demand letters. Nor does Petitioner cite any case law holding that courts should incorporate a treatise, as opposed to state law, into federal common law to bridge a gap in the federal securities laws. In any event, the *pro forma* demand letter requirements for which Petitioner claims to find support in a treatise would be a particularly poor fit for the novel and complex theory of liability on which her complaints are based. *See* Section F, *infra*.

D. Rule 23.1's "Procedural Dictates" Were Irrelevant to the Ninth Circuit's Decision.

Petitioner also claims that the Ninth Circuit "[i]mpos[ed] heightened procedural rules" and "subject[ed] Section 16(b) to the procedural dictates of Rule 23.1." Pet. at 16, 19. This argument is patently false and conflates Rule 23.1's procedural requirements and the substantive requirements of a pre-suit demand under Delaware law, which are two separate and distinct concepts. *See* Section B, *supra*; *see also Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 543 (1984) (Stevens, J., concurring) ("Rule 23.1 is not the source of [the demand] requirement"). The Ninth Circuit did not hold (and Moving Issuers have never argued) that Rule 23.1 applies to Section 16(b)

claims or otherwise controls the substance of a Section 16(b) demand letter. *See* Pet. App. at 51a n.7 ("[T]wo of our sister circuits have suggested that Rule 23.1 does not apply in Section 16(b) actions. . . . We refrain from deciding this question because it is not relevant to our analysis") (citations omitted).

Despite Petitioner's complaint that the Ninth Circuit "relied on Rule 23.1 cases to conclude that Petitioner's demands were not sufficient," Pet. at 21, the court did not rely on those cases for their application of Rule 23.1 or its state counterpart. Rather, the decisions were relevant to the Ninth Circuit's opinion only in that they set forth substantive Delaware law governing the contents of a pre-suit demand letter. Pet. App. at 55a-56a, 56a n.13 (citing *FLI*, 2009 WL 1204363, at *1 n.6 (setting forth Delaware's substantive requirements for a pre-suit demand letter); *Khanna v. McMinn*, No. Civ.A. 20545-NC, 2006 WL 1388744, at *13 (Del. Ch. May 9, 2006) (same); *Gatz v. Ponsoldt*, No. Civ.A. 174-N, 2004 WL 3029868, at *5 (Del. Ch. Nov. 5, 2004) (same); *Yaw*, 1994 WL 8909, at *7 (same)). *See* Section C, *supra*.

The Ninth Circuit's decision, therefore, does not conflict with any of the circuit court decisions cited by Petitioner. Petitioner's cases do not address the content of a Section 16(b) demand letter, let alone suggest that the Ninth Circuit was wrong when it turned to state law – not Rule 23.1 – to determine the required contents of such a letter. *See* Pet. at 22-24 (citing *Blau v. Mission Corp.*, 212 F.2d 77, 79 (2d Cir. 1954) (compliance with Rule 23.1's requirement that a shareholder plead contemporaneous ownership is not required for Section 16(b) claims); *Dottenheim v. Murchison*, 227 F.2d 737 (5th Cir. 1956)

(same); *Grossman*, 674 F.2d at 120 (in deciding whether Rule 23.1 applies to Section 36(b) claims under Investment Company Act, court rejected analogy between Section 36(b) and Section 16(b) because the latter contains its own express demand requirement); *Cramer v. Gen. Tel. & Elec. Corp*, 582 F.2d 259, 276 (3d Cir. 1978) (business judgment rule inapplicable in Section 16(b) context)).[9] Petitioner's attempt to fabricate a conflict should be rejected.

E. The Ninth Circuit's Decision Does Not Reward Insiders or Impede Congressional Intent.

Petitioner argues that the Ninth Circuit's decision will impede the enforcement scheme Congress designed because without a Section 16(a) report, no outsider has access to information required by the Ninth Circuit's decision. Pet. at 10. Petitioner is wrong. The information the Ninth Circuit held was missing from Petitioner's demand letters – the "'wrongdoing . . . allegedly perpetrated'" and "'the legal action the shareholder wants the board to take on the corporation's behalf'" – would not have been reflected in the Section 16(a) reports that Petitioner claims should have been filed. Pet. App. at 59a (citation omitted);

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9. For the same reasons, there is no conflict between the Ninth Circuit's decision and either of the district court decisions cited by Petitioner. *See* Pet. at 23-24 (citing *Segen v. Comvest Venture Partners, LP*, No. Civ.A. 04-822-JJF, 2005 WL 1320875, at *4 (D. Del. June 2, 2005) (business judgment rule inapplicable in Section 16(b) context); *DiLorenzo v. Edgar*, No. Civ. 03-841-SLR, 2004 WL 609374, at *3 (D. Del. Mar. 24, 2004) (noting business judgment rule and Rule 23.1's pleading requirement of contemporaneous ownership do not apply to Section 16(b) claims)). *See also infra* at 24 (purported conflict with district court does not warrant review by this Court).

see id. at 61a. Under Petitioner's theory of liability, the persons who made the challenged purchases and sales are not statutory insiders, officers, directors and major shareholders whose trades would appear on Section 16(a) reports, but rather *customers of the Underwriters*. *See id.* ("According to the Complaints, the Underwriters violated Section 16(b) when they profited indirectly through their *customers*' purchases and sales of the Issuing Companies' shares") (emphasis in original). Nor would a Section 16(a) report reflect the indirect "profits the Underwriters received through their investment banking operations," which Petitioner seeks to disgorge in her complaints.[10] *See id.* at 60a. It is telling that Petitioner was able to bring her complaints despite the fact that no Section 16(a) reports have ever been filed.

The requirement that a pre-suit demand letter contain certain basic information to allow a corporation the fair opportunity to act does not "reward insiders" or in any way hinder a shareholder's ability to proceed with the suit once she has served a proper demand letter and the sixty-day period expires. Instead, a standard requiring sufficient information is necessary to protect the rights afforded issuers by Section 16(b)'s demand requirement. After making a sufficient demand, a shareholder is free to pursue a Section 16(b) claim if the board declines to do so. *See, e.g., Henss*, 132 F. Supp. at 62.

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10. Even according to Petitioner, Section 16(a) reports are only required to set forth "the short swing trading details, identify the insiders and group members, specify the shares in which the insiders have or share a pecuniary interest, and permit the computation of the profits to be disgorged." Pet. at 25.

Petitioner also claims that the Ninth Circuit's decision to permit the Underwriters to challenge the adequacy of the pre-suit demand letters through a motion to dismiss is contrary to congressional intent. Pet. at ii, 26-27; *see also* Pet. App. at 71a n.22. Petitioner, however, has identified no circuit cases in conflict with the Ninth Circuit's holding; thus this issue does not warrant review by this Court. *See* Supreme Court Rule 10.

F. The Ninth Circuit's Demand Ruling Presents No Issue of Widespread Application that Warrants the Court's Attention.

While application of Section 16(b)'s statute of limitations has generated a significant division among the circuits with far reaching implications, *see* Underwriters' petition for writ of certiorari, No. 1261, the scope of Section 16(b)'s demand requirements has not. Thus, Petitioner not only fails to identify a conflict, she also fails to identify an issue of widespread application worthy of the Court's review.

In a typical Section 16(b) action, a shareholder demands disgorgement of short-swing profits in company stock from corporate insiders; thus the sufficiency of the shareholder's demand letter is rarely at issue. Petitioner, however, seeks disgorgement from Underwriters of profits earned "*indirectly* through their *customers*' purchases and sales of the Issuing Companies' shares." Pet. App. at 61a (emphasis in original). Because Petitioner's demand letters vaguely describe "a garden-variety Section 16(b) claim" that "bears no resemblance to the elaborate scheme" alleged in her complaints, *id.*, the adequacy of Petitioner's demand letters was unusually important in

this case. Thus, the district court and the Ninth Circuit were required to ascertain and apply the applicable standard for evaluating the contents of those letters. For these reasons, Petitioner's challenge to the Ninth Circuit's analysis of her demand letters does not involve an issue of widespread application to which this Court should devote its resources.

II. THE NINTH CIRCUIT'S DECISION REGARDING DEMAND FUTILITY WAS PROPER AND DOES NOT CONFLICT WITH ANY OTHER DECISION.

The Ninth Circuit properly rejected Petitioner's attempt to excuse her inadequate demand letters by arguing demand futility. Petitioner attempts to manufacture a conflict by arguing that the "Ninth Circuit erred in its brief analysis of demand futility because, again, it allowed Rule 23.1 to govern its analysis." Pet. at 28. As with the issue of adequacy of demand, Petitioner's purported conflict is illusory. As its decision reflects, the Ninth Circuit did not apply Rule 23.1, which "speaks only to the adequacy of the shareholder representative's pleadings." *Kamen*, 500 U.S. at 96; *see also* Section A, *supra*. Instead, the Ninth Circuit properly considered law from the Moving Issuers' state of incorporation, Delaware, in addressing Plaintiff's unpled arguments regarding demand futility and waiver. *See* Section B, *supra*; *see also* Pet. App. at 52a (citing *Kamen*, 500 U.S. at 108).[11]

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11. It is important to note that Petitioner does not allege demand futility in her complaints; she raised demand futility for the first time in her Opposition Brief before the district court. *See Henss*, 132 F. Supp. at 62-63 (dismissing Section 16(b) action where shareholders *failed to allege* facts to justify filing suit before 60 day period expired); *Coran v. Snap-on Tools Corp.*, 408 F. Supp.

Petitioner's only retort is that substantive law from Delaware is inapplicable because the business judgment rule does not apply to Section 16(b) claims, Pet. at 28-29, a point acknowledged in the Ninth Circuit's opinion, Pet. App. at 54a n.9. Unlike the Ninth Circuit, however, Petitioner ignores that the demand requirement in both 16(b) and Delaware derivative cases provides a corporation with the *opportunity* to evaluate a demand and initiate suit on its own. *See* Section C, *supra*. In both contexts, a shareholder who makes a demand waives the argument of demand futility, because the law will not presume that parties act in a meaningless way – that they undertook futile actions. *See, e.g., Spiegel*, 571 A.2d at 775. By making her demands, Petitioner waived any argument that the Moving Issuers' boards were incapable of properly considering the respective demands and should have been deprived of this opportunity. *Levner v. Saud*, 903 F. Supp. 452, 457 (S.D.N.Y. 1994).

There is no conflict or inconsistency between the Ninth Circuit's decision and the cases cited by Petitioner for the proposition that Rule 23.1 does not apply to Section 16(b)

1060, 1061 (E.D. Wis. 1976) (Section 16(b) demand only excused where demand futility facts "then known" to plaintiff are alleged in complaint). And, while Petitioner claims she has "demonstrated demand futility" in her briefs, Pet. at 27, she apparently bases this conclusion on the fact that Moving Issuers challenged the adequacy of the demand letters – a right to which they are entitled under 16(b) precedent, as Petitioner acknowledges. *Id.* at 26. Moving Issuers' request to terminate the actions with prejudice also cannot demonstrate futility, *id.* at 27, because Petitioner concedes that dismissal on statute of limitations grounds (an argument Moving Issuers presented in the district court and on appeal) "should result in dismissal with prejudice." *Id.* at 30 n.10.

claims, and regardless, all of the cases cited by Petitioner are factually inapposite. *See* Pet. at 29. In *Pellegrino v. Nesbit*, 203 F.2d 463 (9th Cir. 1953), for example, the court did not address demand futility; rather, the language Petitioner quotes is from the court's discussion of whether an appellant can *intervene*, as a matter of right. Pet. at 29 (citing *Pellegrino*, 203 F.2d at 466-67). The fact that a shareholder may be entitled to intervene in an issuer's Section 16(b) suit does not alter the legal principle that demand futility is judged *at the time the complaint is filed*, not based on hindsight. *See Rothenberg v. United Brands Co.*, No. 74 Civ. 5735, 1977 WL 1014, at *3 (S.D.N.Y. May 11, 1977), *aff'd*, 573 F.2d 1295 (2d Cir. 1977); Romeo & Dye, § 9.03[2][b][iii] (demand futility in a §16(b) case "is measured as of the date the complaint is filed"). Here, the Moving Issuers never had the opportunity to evaluate whether they should file suit because Petitioner failed to serve adequate demand letters – a fact Petitioner repeatedly ignores. Thus, this case has no relationship to those where a company brought suit but later failed to prosecute.

Petitioner's other cases fare no better. The only other circuit court decision cited by Petitioner, *Mendell v. Gollust*, 909 F.2d 724 (2d Cir. 1990), *aff'd*, 501 U.S. 115 (1991), addressed whether the plaintiff had standing after a corporate merger, not demand futility. The remaining two cases upon which Petitioner relies are district court opinions that do not give rise to a cognizable conflict within the meaning of Supreme Court Rule 10 and, in any event, are inapposite. *See* Pet. at 29 (citing *Segen v. Comvest Venture Partners, LP*, No. Civ.A. 04-822-JJF, 2005 WL 1320875, at *2 (D. Del. June 2, 2005) (addressing an adequate demand that was wrongfully refused, not demand futility) and *DiLorenzo v. Edgar*,

No. Civ. 03-841-SLR, 2004 WL 609374, at *4 (D. Del. Mar. 24, 2004) (plaintiff specifically pled demand futility in his complaint)). The Ninth Circuit's rejection of Petitioner's demand futility argument was proper and her Petition should be denied.

III. THE NINTH CIRCUIT'S DECISION REGARDING DISMISSAL WITH PREJUDICE WAS PROPER AND DOES NOT CONFLICT WITH ANY OTHER DECISION.

The Ninth Circuit properly held that Petitioner's claims should be dismissed with prejudice, and Petitioner fails to identify any conflict or other justification to grant her Petition on this issue.[12] Petitioner argues that the Ninth Circuit's decision to dismiss the cases with prejudice (i) conflicts with the view that courts should "grant leave to amend 'freely,'" suggesting that she could have cured the deficiencies through amendment, Pet. at 30-31; and (ii) conflicts with *In re Kauffman Mutual Fund Actions*,

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12. Contrary to Petitioner's suggestion that the Ninth Circuit's decision to dismiss with prejudice was *sua sponte*, the Moving Issuers and the Underwriters argued that amendment of the complaint would be futile. *See Moving Issuers-Appellees' Principal Brief* at 1 ("re-filing would be futile because the District Court specifically held that Simmonds could not serve demand letters while these actions were pending"); *see also Underwriter Defendants-Appellees-Cross-Appellants' Reply Brief* at 7-9 (all 54 claims should be dismissed with prejudice because petitioner failed to demonstrate how defects in her pre-suit demands could be remedied by granting leave to amend); *Underwriter Defendants-Appellees-Cross-Appellants' Brief* at 55 ("if the Court affirms the District Court's decision – either on statute of limitations grounds or on any other alternative grounds presented – it should convert the without prejudice dismissals to with prejudice dismissals").

479 F.2d 257 (1st Cir. 1973), one of the very cases upon which the Ninth Circuit relied in converting the dismissal to "with prejudice." Pet. at 31-32. Petitioner is wrong on both counts.

First, the Ninth Circuit noted that it has "previously held that a complaint may be dismissed with prejudice on account of the plaintiff's failure to satisfy the demand requirement, . . . and various other circuits have reached the same conclusion. . . . [The] decision to convert the dismissal is not unprecedented." Pet. App. at 70a. Other than *Kauffman*, discussed below, Petitioner ignores the numerous cases cited by the Ninth Circuit – all of which are in the demand context and consistent with its holding.[13] Instead, Petitioner argues that the decision to dismiss her claims with prejudice conflicts with the general proposition that amendment be freely granted. But the cases she cites all recognize that leave to amend may be denied for a myriad of reasons, including where amendment of the complaint would be futile. Pet. at 30-31 (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962) (rejecting the "outright refusal to grant [ ] leave without any justifying reason,"

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13. *See* Pet. App. at 70a, 70a n.21 (citing *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 990-91 (9th Cir. 1999), *abrogated on other grounds by Tellabs, Inc. v. Makor Issues & Rights*, 551 U.S. 308, 322-24 (2007) (upholding dismissal without leave to amend where plaintiff failed to identify how deficiencies could be cured and where such amendment would be futile); *Kanter v. Barella*, 489 F.3d 170, 181 (3d Cir. 2007) (same); *Starrels v. First Nat'l Bank of Chicago*, 870 F.2d 1168, 1172 (7th Cir. 1989) (same); *Gaubert v. Fed. Home Loan Bank Bd.*, 863 F.2d 59, 69 (D.C. Cir. 1988) (same; citing *Foman v. Davis*, 371 U.S. 178, 182 (1962), for the proposition that such a dismissal is warranted where "the amendments would not serve any purpose")).

but noting amendment may be denied where it would be futile) and *Lopez v. Smith*, 203 F.3d 1122 (9th Cir. 2000) (reversing the denial of leave to amend on account of a mere technical error by a pro se plaintiff, but noting that court may dismiss with prejudice where defects cannot be cured through amendment)).

Here, dismissal with prejudice was appropriate because Petitioner cannot cure the deficiencies identified by the Ninth Circuit. The actual demand letters (as opposed to Petitioner's allegations regarding the content of the demand letters) were properly considered by the district court and reviewed by the Ninth Circuit, which characterized the contents of the demand and "follow-up" letters as "bearing no resemblance to the elaborate scheme described in Simmonds's complaint" and "completely fail[ing] to provide sufficiently detailed information to permit the boards to conduct a good faith inquiry," respectively.[14] Pet. App. at 61a-62a. Thus, Petitioner cannot amend her complaints to provide additional allegations relating to the content of the demand letters; the defects are in the demand letters themselves. Moreover, *Shlensky v. Dorsey*, a Third Circuit decision relied upon by the Ninth Circuit, specifically holds that an inadequate demand cannot be cured by serving a new demand letter after the filing of the complaint. 574 F.2d 131, 141-42 (3d Cir. 1978) (affirming dismissal without leave to amend). Indeed, the district court ruled that it would "not permit [Petitioner] to amend her demand letters while pursuing this action," as to do so after the suit

14. The Ninth Circuit reviewed the district court's dismissal for failure to comply with the demand requirements for abuse of discretion. Pet. App. at 48a.

had been initiated would reduce the demand requirement to a "meaningless formality." Pet. App. at 102a (citation omitted).

Second, despite Petitioner's attempt to manufacture a circuit split, the Ninth Circuit and the First Circuit in *Kauffman* both held that where the issue of demand has been litigated and further amendment would be futile, dismissal may be with prejudice as to that issue. Indeed, the First Circuit explained that "[t]he dismissal is *with prejudice* on the issue of the obligation to make a demand on the directors with respect to that substantive complaint," noting that the plaintiff "is precluded from relitigating the very question which was litigated in the prior action."[15] *Kauffman*, 479 F.2d at 267 (citations omitted) (emphasis added). Far from being in conflict with *Kauffman*, the Ninth Circuit specifically held that "[w]e agree with the First Circuit's approach in *Kauffman*. Simmonds is barred from relitigating issues relating to the adequacy of the demand letters. . . . As with any issue litigated fully on the merits, shareholders may not endlessly relitigate the adequacy of their pre-suit demand." Pet. App. at 71a. Because Petitioner provides no reason to justify this Court's review, the Petition should be denied.

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15. The First Circuit specifically noted that "[i]n affirming we must, however, comment upon one phrase in the order of the district court granting the motion to dismiss, that it is 'without prejudice.' This must mean without prejudice as to the substantive cause of action." *Kauffman*, 479 F.2d at 267.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition.

May 26, 2011

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RECORD AND BRIEFS

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No. 10-1218

In the Supreme Court of the United States

VANESSA SIMMONDS,

Petitioner,

v.

CREDIT SUISSE SECURITIES (USA) LLC, ET AL.,

Respondents.

IN RE SECTION 16(b) LITIGATION

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTRODUCTION

The circuits are split on whether Rule 23.1 derivative law informs Section 16(b) jurisprudence. The circuits are split on the effect of a dismissal on demand adequacy grounds. The questions Petitioner presents regarding the Section 16(b) pre-suit demand requirement involve fundamental issues about the proper interpretation of this critically important insider trading legislation. A decision from this Court will provide needed uniform guidance on basic questions about Section 16(b) enforcement. Review should be granted.

DISCUSSION

I. REVIEW IS NECESSARY TO DECIDE IMPORTANT QUESTIONS OF NATIONAL IMPORTANCE FUNDAMENTAL TO PROPER SECTION 16 ENFORCEMENT.

In their separately filed Petition for Writ of Certiorari, the Underwriters argue that decisions from the Ninth Circuit can provide a "*de facto* nationwide rule" as to important aspects of Section 16(b) jurisprudence. Pet. at 22 (No. 10-1261). If the Ninth Circuit decision is allowed to stand as such a "nationwide rule" on pre-suit demand issues, then Section 16(b) will be rendered impotent in carrying out its fundamental purpose "to curb the evils of insider trading." *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 422 (1972). The Ninth Circuit decision effectively immunizes those insiders in closest privity to material inside information, who intend to use that information to profit through short-swing trading in issuer securities. As occurred here, insiders seeking to

use inside information to reap short-swing, risk-free profits with impunity need only disguise their beneficial ownership of securities in customer or other accounts—with profit-sharing arrangements in place—and then ignore the disclosure requirements of Section 16(a). Such "novel and complex"[1] deception will almost always deprive the issuer's outside shareholders (like Petitioner) of the information that the Ninth Circuit now requires in a Section 16(b) pre-suit demand.

The Ninth Circuit decision, moreover, rewards insiders who engage in this type of deceptive conduct. The decision gives insiders standing to seek dismissal by challenging demand adequacy even where, as here, the insider has failed to file Section 16(a) reports and the shareholder has, as a result, been forced to piece the claim together from disparate and limited sources of information. Ironically, the decision effectively limits Section 16(b) to the rare instances involving "technical violators of pure heart"—those insiders who: (a) inadvertently or unintentionally engaged in transactions covered by Section 16(b); and (b) complied with their Section 16(a) reporting obligations. *Magma Power Co. v. Dow Chem. Co.*, 136 F.3d 316, 320 (2d Cir. 1998) ("Section 16(b) operates mechanically, and makes no moral distinctions[.]").

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[1] Moving Issuers characterize Petitioner's "theory of liability" as "novel and complex." Resp. Br. at 15. However, the theory of liability—disgorgement of profits obtained by statutory insiders through short-swing trades in issuer securities—is straightforward. What is "novel and complex" about this case are the unusual methods Underwriters employed to disguise their beneficial ownership interests in the targeted short-swing trades. *See* Pet. at 7-10.

II. THE NINTH CIRCUIT DECISION CREATES REAL AND SERIOUS JURISDICTIONAL SPLITS IN BASIC SECTION 16 JURISPRUDENCE.

Moving Issuers exalt form over substance in contending that the Ninth Circuit decision does not creating splits of authority on the question whether Rule 23.1 derivative law governs Section 16(b) demand sufficiency. The Ninth Circuit itself noted the conflict in the circuits. Pet. App. A at 51a n.7. The court then stated that the conflict was not relevant to its analysis. *Id.* However, what the Ninth Circuit stated in the footnote, and the actual analysis that the Ninth Circuit performed, are quite different. The main cases on which the Ninth Circuit relied in supporting its view of Section 16(b) demand adequacy are all Rule 23.1 cases in which the fundamental purpose behind Rule 23.1 inherently permeated the courts' analyses.

Section 16(b) and typical derivative actions are materially different in their design, purpose, and legal origin. Section 16(b) creates a primary, not a derivative, right of action. The business judgment of an issuer's board—a fundamental precept of derivative litigation—is antithetical to Section 16(b) enforcement. The demand requirement for a Section 16(b) claim, moreover, is stated explicitly in the statute. There is no "gap" to be filled by reference to Delaware or any other state law. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 108 (1991).

The question what must be contained in a Section 16(b) demand when the insider has failed to file a Section 16(a) report—one of the pertinent questions here—should be addressed not by resort to state

derivative law as the Ninth Circuit did, but by assessing considerations relevant to Section 16(b), *e.g.*, the purposes of the statute, the overall legislative scheme Congress enacted with Section 16, and the significant disadvantage an outside-shareholder has when the targeted insiders fail to comply with their Section 16(a) reporting obligations. *See also Reliance Elec.*, 404 U.S. at 424 (Section 16(b) terms must be construed to "best serve[] the congressional purpose of curbing short-swing speculation by corporate insiders").

One consequence of incorporating Rule 23.1 to govern Section 16(b) demand sufficiency, as the Ninth Circuit has done, is that now a shareholder must describe alleged "wrongdoing" in a demand—***even though "wrongdoing" is not a requirement of a Section 16(b) claim***. Section 16(b) is a strict liability statute. *Foremost-McKesson, Inc. v. Provident Secs. Co.*, 423 U.S. 232, 251 (1976). It does not proscribe the practice of short-swing insider trading. It merely requires those statutorily designated insiders who receive a pecuniary benefit from short-swing trades to disgorge any profits from such trades. *See Reliance Elec.*, 404 U.S. at 422; *Allis-Chalmers Mfg. Co. v. Gulf & W. Indus., Inc.*, 527 F.2d 335, 357 (7th Cir. 1975). The short-swing trades themselves are not "illegal," and there is no Section 16(b) claim if the trades do not generate profits. Peter Romeo & Alan Dye, SECTION 16 § 9.01 (3d ed. 2008). Nor has there ever been a requirement of establishing "wrongful" conduct to state a Section 16(b) claim:

> Section 16(b) is a "blunt instrument" that is "about as subtle as a sledge hammer." The provision is notorious because it imposes strict

> liability on the basis of an objective standard intended to be applied in an automatic, mechanical fashion, without regard to the insider's motive or intent. All that is necessary to establish liability is evidence of insider status and a profitable short-swing transaction. No proof of actual misuse or inside information or bad faith on the insider's part is required.

Id. § 9.01[4] (footnotes omitted) (citing 15 U.S.C. § 78p(b); *Gollust v. Mendell*, 502 U.S. 115, 122 (1991); *Foremost-McKesson*, 432 U.S. at 251; *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 595 (1973); *Reliance Elec.*, 404 U.S. at 424 n.4; *Magma Power*, 136 F.3d at 320; Byron D. Woodside, *Resume of the Report of the Special Study of Securities Markets and the Commission's Legislative Proposals*, 19 BUS. LAW. 463, 476 (1964); William L. Cary, *Recent Developments in Securities Regulation*, 63 COLUM. L. REV. 856, 858 (1963)).

The Ninth Circuit decision is substantively grounded in Rule 23.1 law, notwithstanding the court's stated intention not to do so. The Fifth, Fourth, and Second Circuits hold that Rule 23.1 does not apply to Section 16(b), and have not similarly relied on Rule 23.1 substantive analysis to support a Section 16(b) decision. *Dottenheim v. Murchison*, 227 F.2d 737, 738 (5th Cir. 1956); *Grossman v. Johnson*, 674 F.2d 115, 120 (4th Cir. 1982); *Blau v. Mission Corp.*, 212 F.2d 77, 79 (2d Cir. 1954). The conflict is real—and for the reasons set forth herein and in the petition—the conflict has serious consequences on the ability of shareholders to enforce Section 16 as Congress intended. This is especially true when, as here, the insiders have failed to disclose both their group status

and short-swing transaction details as required under Section 16(a).

III. THE NINTH CIRCUIT DECISION TO DISMISS "WITH PREJUDICE" FOR PRE-SUIT DEMAND INADEQUACY CONFLICTS WITH FIRST CIRCUIT PRECEDENT.

Moving Issuers argue that Petitioner "manufacture[d]" a circuit split between the Ninth Circuit and the First Circuit on whether the dismissal should have been with or without prejudice (assuming demand inadequacy). Resp. Br. at 26. Moving Issuers' argument boils down to this: the Ninth Circuit stated it agreed with the First Circuit in *In re Kauffman Mut. Fund Actions*, 479 F.2d 257 (1st Cir. 1973); therefore, there must not be a conflict. However, the Ninth Circuit held that Petitioner's complaints were dismissed with prejudice. Under the First Circuit approach, the decision to dismiss on account of a precondition to suit, such as demand, is only dismissed "with prejudice" on the very issue litigated (in *Kauffman*, demand futility; here, demand adequacy). Dismissal is "without prejudice" ***as to all other demand issues***. For example, the plaintiffs in *Kauffman* were free to serve a demand and bring a second lawsuit. The First Circuit simply precluded the plaintiffs from filing the second suit without first serving a demand, so as to prevent relitigation of demand futility.

The First Circuit approach is further exemplified in *In re Sonus Networks, Inc.*, 499 F.3d 47 (1st Cir. 2007). In *Sonus Networks*, the First Circuit reaffirmed *Kauffman* and held that a Massachusetts state court

dismissal of a derivative action on demand futility grounds (specifically, a dismissal "without leave to amend") does not preclude a plaintiff from filing a second derivative suit upon satisfying the demand requirement. *Sonus Networks*, 499 F.3d at 55, 59-62. It merely means that the plaintiff is precluded from filing a second derivative suit and contending that serving a demand would be futile:

> While dismissal of a derivative suit for failure to plead demand or excuse [futility] is of course a type of dismissal for inadequate pleadings, it is also a dismissal for failure to accomplish a precondition, which is ***a failure that may be remedied by the time the second suit is filed***. The Supreme Court's decision in *Costello v. United States,* 365 U.S. 265, 285-88 (1961), confirmed that ***dismissal for failure to satisfy a precondition to suit should not bar a subsequent suit in which the defect has been cured***. . . . We acted consistently with this principle in *González Turul v. Rogatol Distributors, Inc.,* 951 F.2d .1 (1st Cir.1991). There, we reversed a judgment after trial in a derivative suit because the plaintiff had not alleged in the complaint either that she had made demand on the directors or that demand would have been futile, *id.* at 1; however, ***we dismissed the complaint "without prejudice,"*** *id.* at 3, ***with the implication that suit could be refiled*** if the plaintiff complied with Rule 23.1. . . . We therefore conclude that dismissal for failure to plead demand under Rule 23.1 is not entirely analogous to dismissal for failure to state a claim. ***We do not believe that applying***

> ***claim preclusion to a dismissal for failure to plead satisfaction of a precondition to suit is compatible with the principle of* Costello *. . . that failures to satisfy preconditions generally can be cured.***
>
> The defendants contend that the dismissal was on the merits in the sense of reaching a substantive issue . . . . The preclusive effect of a dismissal for failure to comply with a precondition to suit does not depend on whether the precondition is "substantive" or "procedural," but on whether the plaintiff has satisfied the precondition between the dismissal of the first suit and the filing of the second. *See* 18A *Federal Practice & Procedure* § 4437, at 184–85 ("Dismissal for failure to satisfy a procedural precondition should be treated in the same way as dismissal for failure to satisfy substantive preconditions. ***The dismissal is not an adjudication on the merits that would bar assertion of the same claim after satisfying the precondition . . . but it should preclude relitigation of the same precondition issue.***").
>
> In sum, we hold that the Massachusetts state court judgment was "on the merits" in the sense that it is entitled to issue-preclusive effect, but ***we reject the defendants' argument that the Rule 23.1 dismissal was "on the merits" in the sense that no further suit could be brought on the same claim.***

Id. at 61-62 (emphasis added).

In the event Petitioner's demand is deemed inadequate despite the insiders' failure to file Section 16(a) reports, Petitioner should be free to either: (a) serve substantively new demands; or (b) file a new complaint alleging demand futility. Litigation of either issue in a second lawsuit would not involve relitigating any issue decided herein. Moving Issuers appear to be in accord with Petitioner at least as to Petitioner's right to file a new complaint alleging demand futility. *See* Resp. Br. at 26 (describing effect of *Kauffman* dismissal).

CONCLUSION

Petitioner respectfully requests that this Court grant her petition and review this matter.

Respectfully submitted,

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